

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

RONALD KUIPER and
CONLEY KUIPER,

No. C06-4009-MWB

Plaintiffs,

Sioux City, Iowa
February 19, 2009
8:07 a.m.

vs.

GIVAUDAN FLAVORS CORP.,

VOLUME 3 OF 12

Defendant.

/

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE MARK W. BENNETT
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

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V. THOMAS MEADOR, ESQ.
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1 (Proceedings reconvened outside the presence of the
2 jury.)

3 THE COURT: Okay. Good morning. What do we have on
4 our agenda this morning?

5 MR. HOLTMAN: Good morning, Judge.

6 THE COURT: Good morning.

7 MR. HOLTMAN: We had one issue having to do with
8 preserving our objections -- they're going to read or show
9 depositions today.

10 THE COURT: Yes.

11 MR. HOLTMAN: And several or many of the exhibits that
12 are going to be used by the deponent we had objected to on our
13 exhibit list and were part of the motion in limine. And we
14 simply want to discuss with you the mechanism for preserving
15 those objections. We don't expect you to go through and rule on
16 them, but they can be grouped. For example, some of the
17 exhibits have to do with documents from the Givaudan plant in
18 Cincinnati. And, you know, you have overruled our motion in
19 limine on that. But we just want to make sure under 103(a)(2)
20 that we have a record on that.

21 I would like to introduce to you Mr. Tom Sullivan,
22 Judge. He's the attorney from our side who has been talking to
23 the plaintiffs about this issue, and he can perhaps give you
24 more definitive information.

25 THE COURT: Okay. Thank you, Mr. Holtman.

1 MR. HOLTMAN: You're welcome.

2 THE COURT: Thank you. Mr. Sullivan, good morning.

3 MR. SULLIVAN: Good morning, Your Honor. As
4 Mr. Holtman was saying, we filed a motion in limine as Your
5 Honor knows. I would say approximately 98 percent of the
6 documents that are within a designation that will be shown today
7 fall within the motion in limine that we filed with respect to
8 the Carthage investigation. There are a couple that followed in
9 the motion in limine for the International Bakers litigation and
10 maybe one or two on the BASF issue that was part of our motion.

11 And we didn't want to trouble Your Honor with filing
12 objections to all those, but as Mr. Holtman mentioned, we'd just
13 like to preserve the record on those. I have --

14 THE COURT: And what would you like to do to make sure
15 you've preserved your record on it?

16 MR. SULLIVAN: I don't know precisely which ones are
17 going to be played this morning, Your Honor, just given the time
18 frame, and also I haven't had the chance to review the very
19 final clips.

20 But one thing I might suggest is that when they get
21 played I can match them to the chart that I've made, and then if
22 it would help, I can send a list of the particular trial exhibit
23 numbers to your law clerk. That might -- that might be one way
24 to do it. And these are all designated within our exhibit list
25 as a B, and I think it's noted, you know, MIL, and then it might

1 say Carthage investigation or BASF. These are described on that
2 exhibit list, and I think if --

3 THE COURT: And you filed your exhibit list so that
4 you've made the record in your exhibit list with regard to all
5 the B objections; right?

6 MR. SULLIVAN: That's correct, Your Honor.

7 THE COURT: And then we can kind of incorporate by
8 reference your objections in the exhibit list and give you a
9 standing objection if you'd like it to any B exhibits used in
10 the deposition or in any portion of the trial.

11 MR. SULLIVAN: That sounds -- sounds fine, Your Honor.

12 THE COURT: And that certainly puts me on notice that
13 you've objected to it, I've overruled the objection per the
14 in limine rulings. And again, you know, I always hate to
15 represent what it takes for a party to preserve their record.
16 But since a large part of preserving the record is to give the
17 trial court judge notice of what the objection is so that we can
18 rule on it or reconsider it, I feel you've done everything you
19 can to put me on notice as to what your objection is.

20 And I'm fully satisfied that by lodging the objection
21 in the pretrial order that you've preserved your record for my
22 purposes and that by giving you a standing objection to it
23 that's kind of a second line of defense to make doubly sure that
24 you've preserved your record. And it certainly satisfies any
25 need that I have as a trial court judge. If there's anything

1 else I can do for you to help you preserve your record, I'd be
2 glad to do it.

3 MR. SULLIVAN: Thank you, Your Honor. That
4 belts-and-suspenders approach works fine.

5 THE COURT: Okay. Anything else you'd like to say,
6 Mr. Sullivan, or any other problems you're foreseeing in this
7 deposition?

8 MR. SULLIVAN: Not right now, Your Honor. I just
9 want -- the plaintiffs provided me with the very final clips. I
10 just want to take a few minutes to review those before they're
11 actually played.

12 THE COURT: Okay. And are you going to have time to
13 be able to do that before 8:30?

14 MR. MCCLAIN: It's not at 830. Dr. Egilman is at
15 8:30.

16 THE COURT: Oh, that's right. Thank you.

17 MR. SULLIVAN: I will take a look at them before 8:30
18 and during the breaks as well, Your Honor.

19 THE COURT: Okay. Great. Thank you.

20 Mr. Meador, anything else?

21 MR. MEADOR: No. You called me my right name.

22 THE COURT: Yep. See, but you've been pronouncing
23 it -- how old are you?

24 MR. MEADOR: I am 55.

25 THE COURT: Oh, you've been pronouncing it wrong for

1 55 years. You know, it looked to me like Mead, M-e-a-d, but the
2 "a" is really silent. Is that how to look at it, so it's
3 Meador?

4 MR. MEADOR: Yeah, like med her.

5 THE COURT: But like the company Mead, for example, is
6 M-e-a-d.

7 MR. MEADOR: If you want to order my name changed to a
8 different pronunciation, that's okay.

9 THE COURT: I'm teasing you. I'm sorry. I apologize
10 to you for mispronouncing it, and I'll do better.

11 MR. MEADOR: My second point is even more minor. I'm
12 a little high energy. Can I walk over here to the side during
13 cross-examination?

14 THE COURT: Absolutely.

15 MR. MEADOR: Like right here?

16 THE COURT: Oh, you can come up in -- you know, here's
17 my deal. I know I have a lot of crazy rules, but where you
18 examine witnesses, as long as you've got a mike on, if you want
19 to crawl underneath your table, you know, you can do it pretty
20 much from everywhere but getting in the jury box. That's the
21 only thing that's out of bounds.

22 MR. MEADOR: I thought this might be electrified in
23 here.

24 THE COURT: But no, anywhere in the well of the
25 courtroom is fine, anywhere you want to walk or stand or if you

1 want to walk up to the bench here or do it from the corner here.
2 You just can't do it up on the bench.

3 MR. MEADOR: Thank you, Your Honor.

4 THE COURT: I guess I could get a chair for you and
5 put it up here. Anywhere you want to go is going to be fine.

6 MR. MEADOR: I actually have a few rulings I'd like to
7 make this morning if it's okay with you.

8 THE COURT: Well, it's your turn to have the
9 flashcards for me, so, you know, you just hold up whether you
10 want them overruled or sustained.

11 Mr. Meador, anything else?

12 MR. MEADOR: No thanks.

13 THE COURT: Okay. Mr. McClain, do we have anything?

14 MR. MCCLAIN: No, I don't think so.

15 THE COURT: Okay. Well, we'll see you back here at
16 8:30 then; okay? Thank you.

17 (Recess at 8:14 a.m.)

18 THE COURT: Mr. Meador, ready to have the jury brought
19 in?

20 MR. MEADOR: Yes, Your Honor.

21 THE COURT: Okay. Thank you.

22 (The jury entered the courtroom.)

23 THE COURT: Good morning. Please be seated. Thank
24 you.

25 You will recall that Mr. Meador is cross-examining

1 Dr. Egilman, and you may continue with your cross-examination.

2 MR. MEADOR: Thank you. Good morning.

3 DAVID EGILMAN, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

4 CONTINUED CROSS-EXAMINATION

5 BY MR. MEADOR:

6 Q. Good morning, Dr. Egilman.

7 A. Good morning.

8 Q. Now, yesterday we were talking about some of the Tastemaker
9 products, and we talked about how they would buy pure product
10 from suppliers, and then the pure product would be delivered to
11 their plant. And then at the Tastemaker plant, they would take
12 various chemicals from a formula and mix it together and get
13 butter flavoring; correct?

14 A. That's correct.

15 Q. And we talked a lot about diacetyl, but diacetyl is just
16 one of many ingredients in the butter flavoring; correct?

17 A. That's correct.

18 Q. It's the ingredient actually that gives the butter
19 flavoring of the popcorn, at least one of them; true?

20 A. That's correct.

21 Q. And you've looked at some of the formulas; right?

22 A. That's correct.

23 Q. And there are 15 to 20 approximately chemicals in some of
24 these butter flavorings; correct?

25 A. Or more, that's correct.

1 Q. Or more, correct. And when we talk about butter flavoring,
2 Tastemaker made different types of butter flavoring; true?

3 A. That's correct.

4 Q. And by that I mean they made a powder?

5 A. That's correct.

6 Q. They made a paste?

7 A. That's correct.

8 Q. And they made a liquid.

9 A. That's correct.

10 Q. Now, for the paste products, the amount of the diacetyl --
11 strike that.

12 For the powder products, the amount of diacetyl in the
13 powder was very small; is that right?

14 A. I don't remember the exact percentages, and small is a
15 relative term. So you've gotta give me a comparative to answer
16 that question.

17 Q. Fair enough. How about less than 3 percent in powders?

18 A. I think that's probably generally true, but I honestly do
19 not remember the percentages in each product.

20 MR. MEADOR: Final pretrial status order.

21 Q. Now, in this case --

22 MR. MEADOR: Go to page 5.

23 Q. -- we've entered into certain stipulations between the
24 parties as to certain facts in this case. And we've entered
25 into stipulation on Mr. Kuiper's work history at the plant. And

1 if you look at 46 -- wait. Where's 45? No, that's not it.

2 Okay. Never mind. He first started working at the plant
3 approximately 1986; is that right?

4 A. That's correct.

5 Q. And per the stip, his first position was in the corn
6 shelling area; is that right?

7 A. That's correct.

8 Q. And then he worked in the corn shelling area for
9 approximately five years; true?

10 A. That's correct.

11 Q. And then he worked as a janitor for approximately one year;
12 right?

13 A. That's correct.

14 Q. And then approximately one year after becoming a janitor,
15 that's when he came in the mixing room; correct?

16 A. That's correct.

17 Q. And it's fair to say that would have been sometime in 1992;
18 correct?

19 A. That's correct.

20 Q. Trial Exhibit 3124A. Now, yesterday you established that
21 you were an expert in ice cream and library cards. But is it
22 fair to say you're not an expert in corn shelling?

23 A. In what?

24 Q. Corn shelling operations.

25 A. That's correct.

1 Q. And do you recognize this as a map of the American Pop Corn
2 plant?

3 A. Yes.

4 Q. And do you see where it says microwave popcorn?

5 A. Yes.

6 Q. And is it your understanding that's where the mixing room
7 was?

8 A. Yes.

9 Q. And then outside the microwave popcorn plant, you got silos
10 and corn cribs. I don't know. There's nine corn cribs
11 approximately, or eight; is that right?

12 A. That's correct.

13 Q. And when Mr. Kuiper worked in the corn shelling operation,
14 he was working outside near the silos and the corn cribs; is
15 that right?

16 A. Yeah, that's outside the building, correct.

17 Q. Now, let's change subjects here. Trial Exhibit 3031. Now,
18 Dr. Curtiss Farrell is Mr. Kuiper's regular doctor; is that
19 true?

20 A. That's correct. Well, he was until January.

21 Q. He saw him in Dunes, South Dakota?

22 A. He just moved to Nebraska.

23 Q. And he has been his regular treating doctor for over 20
24 years; right?

25 A. He was until about the middle of last year, yes.

1 Q. But putting that aside, for the previous 20 years, he was
2 his doctor; true?

3 A. He started in '92 and did the summer of last year, so it's
4 a little less than that, about 15, 16 years.

5 Q. Now, you reviewed the medical records of Dr. Farrell;
6 right?

7 A. Correct.

8 Q. And in there if you look, there's an entry that says SOB.
9 That stands for shortness of breath; right?

10 A. Correct.

11 Q. And then there's another entry where it says, "Gets relief
12 from chest tightness with rest"; true?

13 A. Right. Can you get the date for this one?

14 Q. I'll have to come back.

15 A. It's a 1988 one now that I see it. If you look at the
16 bottom of this record, you'll see it says, "See back," and on
17 the next page it says 1988 on the bottom I believe. Right.

18 Q. And at this time it's recommended that he go to the
19 hospital and get this thing worked up; right?

20 A. That was part of what was recommended, correct.

21 Q. And Mr. Kuiper decided that he would, in fact, wait and go
22 home; true?

23 A. Correct.

24 Q. And then in Trial Exhibit 3102, this is a note from
25 Dr. Farrell in December of '92; right?

1 A. Correct.

2 Q. Looks like December 8, 1992?

3 A. It's cut off on mine. Oh, I can't -- yes. I can't see
4 that on mine, but yes.

5 Q. And it says, "However, on exam, he doesn't move well. He
6 said he tried to use the inhalers" --

7 A. Can you just wait one second because it's -- mine is cut
8 off on the left, so I just want to be able to look?

9 THE COURT: We're having some problems with some
10 monitors, and our tech people are having a hard time figuring
11 out why, so I apologize for that. You can turn around and look
12 if that's what you need to do.

13 THE WITNESS: It's being fixed as we speak. It's fine
14 now.

15 THE COURT: Okay. Thanks.

16 THE WITNESS: Thanks.

17 BY MR. MEADOR:

18 Q. It says, "However, on exam he doesn't move his air well.
19 He tried using inhalers, but that caused him to cough so much he
20 quit using them"; true?

21 A. Correct.

22 Q. And he states he had this problem for maybe three years,
23 ever since he's worked in this area; right?

24 A. Correct.

25 Q. And that area is referring to the corn shelling operation;

1 right?

2 A. Well, no. At this time he's working in the microwave area,
3 so it includes both.

4 Q. However, I saw him back in August of 1988, and he had some
5 symptoms similar to this and was seen by Dr. Fell; right?

6 A. You read that correctly.

7 Q. Now, in the summer of '96 approximately, Mr. Kuiper began
8 to have some heart problems; is that right?

9 A. What year was it that you said? It's '88 is when he first
10 had heart problems, symptoms that they thought might be heart
11 problems.

12 Q. Let's go to trial Exhibit 3225. And anyway, he treated
13 with a heart specialist by the name of Dr. Zuehlke,
14 Z-u-e-h-i-l-k (sic)?

15 A. That's correct.

16 Q. And trial exhibit indicates that on July 11, '96, he went
17 to see Dr. -- I can't pronounce -- Zuehlke?

18 A. I think so.

19 Q. And Dr. Zuehlke took a history from Mr. Kuiper; right?

20 A. That's correct.

21 Q. And he took this history prior to 2001 when he had his
22 stroke; correct?

23 A. That's correct.

24 Q. And he told Dr. Zuehlke that he works for American Pop Corn
25 and there has been concern that he may have had exposure related

1 to his employment; true?

2 A. Well, I can't -- I assume that's where the doctor got the
3 information. He may have had other records too.

4 Q. And then --

5 A. That's certainly what the doctor's impression was, yes.

6 Q. And then it says his symptoms stretch back to at least
7 1988; correct?

8 A. That's correct.

9 Q. Trial Exhibit 3235. Now, Dr. Egilman, Mr. Kuiper was
10 referred to another heart specialist in 1996; right?

11 A. That's correct.

12 Q. And Dr. Baller took a history from Mr. Kuiper; right?

13 A. That's correct.

14 Q. And Mr. Kuiper told him that he has a chronic --

15 A. No, no, no. If -- this is a letter from Dr. Zuehlke to
16 Dr. Baller. This is not Dr. Baller's note.

17 Q. Thank you. I stand corrected.

18 In the letter it says he has a chronic problem with
19 shortness of breath dating clear back to 1988; right?

20 A. You read that correctly.

21 Q. But he has noticed that going clear back to '89 or '90 when
22 he would go up an incline at work and exert, he would find it
23 very hard to breathe and have an oppressive breathlessness;
24 correct?

25 A. Well, the rest of the sentence is "feeling in his chest,

1 nonradiating, not fairly specific chest pain," so the --

2 Q. And you -- and you reviewed this document; right?

3 MR. MCCLAIN: Your Honor, could the doctor be allowed
4 to answer the question?

5 MR. MEADOR: I asked him a leading question.

6 THE COURT: Well, just why don't you reask the
7 question.

8 BY MR. MEADOR:

9 Q. You reviewed this record, didn't you, in forming your
10 opinions in this case?

11 A. Yes.

12 Q. Trial Exhibit 3271, this is a progress note from
13 Dr. Farrell dated February 10, 1997; true?

14 A. Can you just give me a second to orient on that?

15 Q. Sure.

16 A. I think that's correct, yes.

17 Q. And he says in this record, "Although I've seen him now for
18 maybe eight to ten years and his status probably hasn't changed
19 a whole lot in that ten years." That's what he said at that
20 time; correct?

21 A. That's correct.

22 Q. And you reviewed this document in forming your opinions in
23 this case; true?

24 A. That's correct.

25 Q. Let's go to Trial Exhibit 3689. Now, yesterday you talked

1 about the NIOSH investigation out at the American Pop Corn
2 plant; right?

3 A. That's correct.

4 Q. And as part of the investigation, the employees filled out
5 a questionnaire for NIOSH; is that right?

6 A. That's correct.

7 Q. And in this --

8 MR. MEADOR: Well, go back to the first page, please.

9 Q. And this is a letter from Department of Health Services
10 indicating they were sending records pertaining to Ronald
11 Kuiper; true?

12 A. Correct, to you, yes.

13 Q. And let's go to page 3. And it indicates there that
14 Mr. Kuiper changed his job duties in July of 1996; true?

15 A. That's correct.

16 Q. And at that point in time he moved out of the
17 mixer/blending room; right?

18 A. That's correct.

19 Q. And at the time he went to do some janitorial work,
20 cleaning in the microwave building; right?

21 A. That's correct.

22 Q. And they also asked him how often he uses his respirator.
23 What percentage of time did you wear a respirator while pouring
24 other ingredients into tanks in the mixing room? And he
25 indicated 20 percent; isn't that right?

1 A. I don't recall the -- is that on the right? Yes, that's
2 correct.

3 Q. And he was asked how many years he was exposed to grain
4 dusts at American Pop Corn, and he said eight; isn't that right?

5 A. That's correct.

6 Q. Now, you've reviewed Dr. Parmet's reports and deposition in
7 this case; right?

8 A. That's correct.

9 Q. And Dr. Parmet has indicated that Ron's -- that
10 Mr. Kuiper's lung function was stable between 1992 and 1996; is
11 that correct?

12 A. I don't recall that exactly, no.

13 Q. Now, Mr. Kuiper also treated with a local pulmonologist
14 here by the name of Dr. Craig Bainbridge; is that right?

15 A. That's correct.

16 Q. And Dr. Bainbridge is from the University of Iowa?

17 A. I don't recall.

18 Q. And he's a board-certified pulmonary -- pulmonologist?

19 A. I believe that's correct.

20 Q. And he's been treating Ron for his lung problems; right?

21 A. On and off since '96 I think, yes.

22 Q. Trial Exhibit 3626.

23 A. '95, sorry.

24 Q. This is a progress note dated September 12, 2005; right?

25 A. That's correct.

1 Q. And Dr. Bainbridge stated, "I did do a CT scan, and he did
2 not have any mosaic pattern or anything suggestive of any
3 bronchiolitis." Is that true?

4 A. You read it correctly.

5 Q. Now, when Mr. Kuiper worked as a janitor, he used some
6 chlorine-based cleaners, didn't he?

7 A. From time to time, yes.

8 Q. Trial Exhibit 3323. This is another progress note from
9 Dr. Farrell; right?

10 A. That's correct.

11 Q. And it's dated 5-5-98?

12 A. That's correct.

13 Q. And he told Dr. Farrell that he was coughing up a lot of
14 clear, whitish sputum which had a chlorine taste; correct?

15 A. That's what Dr. Farrell wrote, yes.

16 Q. Trial Exhibit 3234. Mr. Kuiper also saw Mr. Bacon who is
17 in the same office with Dr. Farrell; right?

18 A. Dr. Bacon, yes.

19 Q. He's in the same office; true?

20 A. I think so.

21 Q. And he gave him -- look down at the part where it says
22 tests. He gave him a pulmonary function test; right?

23 A. That's -- on this day, yes.

24 Q. And the results of the test was there was --

25 A. You know, I'm not sure about this record because it's --

1 this is -- can you go to the bottom of this record because -- so
2 I can just be sure whose it is? It's on the other page. This
3 is a two-page document. Okay. So this is Dr. Bacon's note I
4 guess.

5 Q. In the impression it says, He does have a good response to
6 bronchodilators, so this would be consistent with a diagnosis of
7 asthma; is that right?

8 A. That's part of what he said, yes.

9 Q. Let's go back to the first page, please.

10 A. It's not -- it's not entirely what he said about the
11 diagnosis.

12 Q. And he was given a pulmonary function test; true?

13 A. That's correct.

14 Q. And he was given the test we've talked about yesterday,
15 FEV1; correct?

16 A. That's correct.

17 Q. And FEC too?

18 A. Correct.

19 Q. Can you explain what the FEC is?

20 A. That's the measure when I -- as I described yesterday, when
21 you take a deep breath in, it's a measurement of how much air
22 you can bring in to your lungs. When it's abnormal, it
23 generally indicates that you cannot move your lungs as much as
24 you should be able to, and that's called restriction. Basically
25 think about restriction to expanding your lungs. And so it's

1 restrictive lung disease.

2 Q. And the results of this tests was there was a 15 percent
3 improvement in his FEV1. It says, "Plus bronchodilators." I
4 assume that means post-bronchodilators.

5 A. That's correct.

6 Q. And 20 cent -- 20 percent improvement in his FEC; right?

7 A. Yeah. FEC is not FVC. That's forced --

8 Q. FEC.

9 A. FEC which is what this is is forced expiratory capacity.

10 Q. And the 15 percent improvement in the FEV1
11 post-bronchodilator, that would indicate reversibility, wouldn't
12 it, sir?

13 A. Not when you see an improvement in the total volume because
14 that means it may be effort dependent because you're seeing
15 changes in two things, so that what's happened in the second
16 exam is he's clearly expanded his lungs more by 20 percent. And
17 so it may be that his expiratory volume was improved because he
18 gave a better effort since he clearly had a better effort in
19 terms of how much air he got in.

20 Q. Thank you. Trial Exhibit 3707. This is the results of a
21 high resolution CT scan of the chest; right?

22 A. Correct.

23 Q. And they have expiration view of the chest, true,
24 inspiration, expiration?

25 A. That's correct.

1 Q. And the results of that test, some mild prominence of the
2 interstitial marking of lungs; right?

3 A. That's correct.

4 Q. This is nonspecific finding. No alveolitis or areas of air
5 trapping are noticed; true?

6 A. That's correct. You read that correctly.

7 Q. Let's go to 3603. Yesterday you talked a bit about this
8 document; right? It's a NIOSH health hazard evaluation report;
9 true?

10 A. That's correct.

11 Q. Before we get into the document, let me ask you a couple
12 questions here. NIOSH came and investigated at the American Pop
13 Corn plant; right?

14 A. That's correct.

15 Q. And would you agree that going back to at least 1989 APC
16 had closed tanks in the mixing room?

17 A. They had lids on them. They didn't always keep them
18 closed. Wasn't a closed -- it was not what one would consider a
19 closed process, so no.

20 Q. And they had local exhaust on the tanks; true?

21 A. No. They had exhaust --

22 Q. And going back to 1989, they had a mandatory respiratory
23 policy; right?

24 A. Yes.

25 Q. Now, you showed a little bit of this document yesterday.

1 Let's go and look at it a little bit more. Now, in the summary
2 section -- we didn't look at that yesterday. In the summary
3 section of the report, air sampling on the day they're there
4 showed that air concentrations of diacetyl, a predominant
5 butter-flavoring chemical, measured as a marker of
6 butter-flavoring exposure were very low compared to levels that
7 were associated with abnormal lung function at the Missouri
8 index plant. The company reported that workers who handled
9 flavorings had used full face respirators with particulate
10 filters and organic vapor cartridges since shortly after the
11 microwave popcorn plant began operating in December of 1988.

12 THE COURT: Was there a question there?

13 Q. In forming your opinions in this case, Dr. Egilman, you
14 reviewed this document, this section, didn't you?

15 A. Yes.

16 Q. And then later in the report they report the results of
17 some of the levels of diacetyl they found in the plant; right?

18 A. That's correct.

19 Q. And let me ask you a question before we get more in the
20 document. There's a difference between area samples and
21 personal samples; right?

22 A. That's correct.

23 Q. I mean, area samples are taken just like it sounds, of a
24 particular area in the plant; true?

25 A. Yes.

1 Q. And when the sample's taken, the worker may or may not be
2 in that area when the sample's taken; correct?

3 A. That's correct, although generally you do area samples in
4 an area where you think the workers are going to be.

5 Q. I couldn't agree more with you. And then there's personal
6 samples which means you -- like I have this microphone on me and
7 I'm -- so people can hear me in court. The personal sample is
8 they put equipment on so they can take measurements of the
9 person during the workday; right?

10 A. That's correct.

11 Q. And so personal samples more accurately reflect an exposure
12 an individual might give -- might get on a particular day than
13 area samples; right?

14 A. In general that's correct.

15 Q. Now, they did take samples at American Pop Corn, and they
16 did record those samples results in a report; right?

17 A. Yes.

18 Q. And what they found that at American Pop Corn the area
19 diacetyl air concentrations in the mixing room were 0.57 parts
20 per million, ppm, parts air by volume when liquid and paste
21 flavorings were used on July 29 and were below the limit of
22 detection of the sampling method when powder flavorings were in
23 use on July 31 and August 1.

24 And in formulating your opinion on exposure levels in
25 this case, Dr. Egilman, you reviewed this part of the report,

1 didn't you?

2 A. I reviewed the whole report. This is only --

3 Q. Now --

4 A. This is only part of what they found.

5 Q. Now, it says that -- at least for powder, it says, "Were
6 below the limit of detection." This may be obvious to everyone.
7 But when it says below the level of detection, that means they
8 didn't find any diacetyl in the air; is that right?

9 A. That's correct. There's a limit below which there may be
10 diacetyl in the air but the device used to test it can't find
11 it. They never say it isn't there. They just say it's below
12 our ability to measure it if it is there.

13 Q. And then NIOSH goes on to say personal diacetyl exposures
14 for the mixers for the 3 days of sampling were 0.04, 0.004, and
15 0.005 ppm respectfully (sic). Did I read that right?

16 A. You read that part right, yes.

17 Q. And in formulating your opinions in this case, you reviewed
18 this part of the report, didn't you?

19 A. I reviewed this part and the entire report, yes.

20 Q. Now, you indicated that you have reviewed Dr. Parmet's
21 report; is that right?

22 A. That's correct.

23 Q. And did you read the part where Mr. Kuiper told Dr. Parmet
24 that the powder flavors don't bother him much?

25 A. I don't recall that language specifically.

1 Q. And speaking of powders, most of the product that
2 Tastemaker provided to American Pop Corn, it was powder, wasn't
3 it?

4 A. By volume or by percentage of diacetyl that went into the
5 plant? It's different depending on which is the question.

6 Q. I'm just -- I'm just talking by volume.

7 A. Yes.

8 Q. Now, yesterday -- and maybe I misunderstood you -- that
9 this whole thing -- strike that.

10 Yesterday you talked about Jasper, and that's the part
11 where NIOSH went in and first discovered this problem and
12 investigated. And I thought you indicated yesterday that some
13 of the CT scans at Jasper were negative for the mosaic pattern.

14 A. No.

15 Q. Let's go to Exhibit 952, please.

16 A. Can I just see the rest of this document?

17 Q. Yeah, I was just saying that.

18 A. I mean, if you're just going to ask me a reading question,
19 that's no problem.

20 Q. No, no, I was going to . . .

21 A. Okay.

22 Q. NIOSH health hazard evaluation report, Jasper, Missouri,
23 January 2006; right?

24 A. Right. This is not the one I was referring to because --

25 Q. Right. I stand corrected. This is a later report from

1 NIOSH for the same facility; true?

2 A. Correct.

3 Q. And in this study at NIOSH, they found all high-resolution
4 chest computed tomography scans, HRCT, showed marked bronchial
5 wall thickening and mosaic attenuation with air trapping on the
6 expiratory view; right?

7 A. Correct. Well, if you could go up, I'm not sure -- they
8 didn't do the CAT scan, so it was whatever was done on the
9 workers they examined by their private doctors, so I need to see
10 if -- I forget the numbers above. If you go back to the
11 original view, I think that that's -- you read it correctly if
12 that suffices.

13 Q. Okay. I'm moving on here. Now, you reviewed all the
14 medical records; right?

15 A. I reviewed all the ones I got.

16 Q. And when you reviewed the medical records, there wasn't any
17 evidence in there that Mr. Kuiper had a short-term high-dose
18 exposure to any diacetyl; right?

19 A. In the records, no.

20 Q. Now, yesterday you talked about Tastemaker and what
21 happened at its plant in Carthage; right?

22 A. In where?

23 Q. Carthage which is outside Cincinnati.

24 A. You said Tastemaker.

25 Q. Yeah.

1 A. Okay. Okay. Yeah.

2 MR. MCCLAIN: Your Honor, I don't know what
3 distinction's being made between Tastemaker and Givaudan. I
4 object to that as long as -- I object to the question as
5 phrased.

6 THE COURT: Overruled.

7 BY MR. MEADOR:

8 Q. What I'm driving at -- I wasn't trying to make any
9 distinction. But there was an investigation at the plant in
10 Cincinnati, Ohio; right? You testified about that yesterday.

11 A. Cinc -- originally you said Carthage, didn't you?

12 Q. Yeah.

13 A. Okay. Well --

14 Q. Oh, you don't know the plant is actually in Carthage --

15 A. No, no, no, not --

16 Q. -- not Cincinnati?

17 A. There was -- the problem is there was another -- there was
18 another issue at Carthage in Joplin, so there's two Carthages,
19 so that's where I was confused. Sorry.

20 Q. But yesterday you were talking about --

21 A. The Cincinnati plant, yes.

22 Q. -- the Cincinnati plant, okay. So I'd like to go through
23 in a more chronological order and talk about what happened at
24 that plant.

25 MR. MEADOR: So if we could go to the final pretrial

1 order, please, page 4.

2 Q. So in this order we stipulated to more facts. And I think
3 you talked about this yesterday, but after the coroner reported
4 the problem and the death of Janice Irick, the plant personnel
5 formed a task force to investigate; right?

6 A. That's correct.

7 Q. And they had senior management on this task force; true?

8 A. That's correct.

9 Q. They had their regulatory tox person; right?

10 A. Nancy Higley, that's correct.

11 Q. And they had Industrial Hygienist John Hochstrasser; right?

12 A. I'm not sure he's a certified hygienist. He was certainly
13 the head of environmental health and safety, yes.

14 Q. And he was in charge over time in terms of the industrial
15 hygiene of the plant; right?

16 A. Correct. He was an engineer.

17 Q. And then in 1994 they hired Stuart Brooks, and we'll talk
18 about him in a minute. And then in '95 they hired Dr. Roy
19 McKay, Dr. James Lockey, and Susan Pinney from the University of
20 Cincinnati; right?

21 A. That's correct.

22 Q. Now, when you were talking about American Pop Corn
23 yesterday, you testified about the difficulty sometimes of
24 identifying whether somebody has bronchiolitis, asthma, or some
25 other respiratory problem, right, back in the early '90s?

1 A. With respect to this product, the people exposed to
2 diacetyl can present as if they had asthma or restrictive
3 disease or some other lung disease.

4 Q. And the doctors that were looking at the patients for
5 American Pop Corn, they had trouble diagnosing the diseases;
6 right?

7 A. Not at Givaudan plant. There were biopsies -- there were
8 biopsies and definitive diagnoses --

9 Q. Okay. Well, that's not my question. I'll get to that in a
10 minute. I was talking about the American Pop Corn plant.

11 A. Oh, here? For sure.

12 Q. Now, you reviewed the records of Dr. Baughman, haven't you?

13 A. Yes.

14 Q. And Dr. Baughman had some trouble diagnosing what people
15 had, didn't he, at the Givaudan plant?

16 A. Sometimes he made the diagnosis. Sometimes he didn't. I'm
17 not sure what you mean by trouble.

18 Q. Well, sometimes in the early years he questioned whether it
19 was occupationally related or whether it was some other problem;
20 right?

21 A. You know, I think he went back and forth on some of the
22 cases. On other cases he was clear. I think in general he
23 thought that none of the -- all of them had -- should be
24 restricted from exposure whether he made a diagnosis or not.

25 Q. Now, yesterday you were shown a document by Mr. McClain,

1 Trial Exhibit 103. And the part in green is the part
2 Mr. McClain put up for you yesterday. Do you recall that?

3 A. Yes.

4 Q. And above that it refers to Dr. Baughman; correct?

5 A. Yes.

6 Q. And it talks about Dr. Baughman's evaluation of Cliff
7 Walker; right?

8 A. Yes.

9 Q. And it says, "i.e., no work-related illness"; true?

10 A. That's part of the sentence.

11 Q. And then it says -- it looks like "Conclusion, work does
12 not cause illness"; right?

13 A. Right. That was what Dr. Baughman said, and the rest is --
14 says that Baughman hadn't made the diagnosis but that the
15 company people felt that their exposures were making Mr. Walker
16 worse.

17 Q. Now, Trial Exhibit 111, this is a document that says,
18 "Occupational exposure investigation, liquids department,
19 Cincinnati, Ohio, September 9, 1993"; right?

20 A. Correct.

21 Q. And in 1993 --

22 A. You know, just if I might ask, if you can pull them to the
23 right when you pull them up, then I won't have to keep turning
24 if you don't mind. Thanks.

25 Q. No problem. And in 1993, Tastemaker was still

1 investigating the problem at the plant; right?

2 A. That's correct.

3 Q. And at least in September 1993 what they were saying is the
4 prognosis for identifying a single etiological agent is not
5 good. Also, two or more chemicals could be acting
6 synergistically, or a chemical or combination of chemicals could
7 be acting as a promoter. To make matters even more difficult,
8 single or multiple chemicals could be acting synergistically
9 with viral or bacterial diseases to effect a bronchitis or
10 bronchiolitis, or a chemical or chemicals could be invading the
11 respiratory tracts of employees weakened by an infectious
12 disease and/or could be interacting with antibodies formed by
13 recent diseases and/or exposures.

14 And in forming your opinions about Tastemaker in this
15 case, you reviewed this document, didn't you, sir?

16 A. Yes, the whole document.

17 Q. Now, it says the prognosis for identifying a single
18 etiological agent is not good. And does etiological mean
19 looking for the cause?

20 A. Yes.

21 Q. Trial Exhibit 116. This is a memo dated November 8, 1993,
22 Paul Farrell. Paul Farrell was the safety director; right?

23 A. That's correct, at the Givaudan plant in Cincinnati.

24 Q. Yeah, with a copy to Nancy Higley; right?

25 A. Correct.

1 Q. And Randy Schmelzel. He was the plant manager; true?

2 A. At this time I think that's correct.

3 Q. And at that time they began initiating an industrial
4 hygiene sampling program; correct?

5 A. No.

6 Q. At this time they prioritized the list of chemicals for
7 which they needed to perform an industrial hygiene sampling
8 program; right?

9 A. As soon as possible. That's what they wrote down, yes, but
10 they didn't initiate it.

11 Q. And the first six chemicals they were looking at were
12 dimethyl sulfate -- I may be mispronouncing these. Allyl --
13 well, forget that one. Ferrous sulfate, and the jury can read
14 it. Anyway, none of these chemicals are PELs or TLVs; right?

15 A. In the United States that's correct.

16 Q. Now let's go to Trial Exhibit Number 129. Yesterday you
17 talked about Stuart Brooks, and he was hired to help investigate
18 the problem at the Tastemaker plant; true?

19 A. Correct.

20 Q. And this -- this is a memo from John Hochstrasser, right,
21 dated June 2, 1994; true?

22 A. That's correct.

23 Q. And this is directed to Mike Davis, the president?

24 A. That's correct.

25 Q. And Bob Pellegrino. He was an officer; true -- officer

1 too?

2 A. I don't remember who he was.

3 Q. And Karen Duros was a lawyer. And Ed Steiger headed up the
4 task force; right?

5 A. I don't recall who was in charge of the -- I think it was
6 different peoples -- different people at different times.

7 Q. Anyway, this is a memo recording the visit from Stuart
8 Brooks to the plant; right?

9 A. That's correct.

10 Q. And what Mr. Hochstrasser said on June 2, 1994, Dr. Brooks
11 could not identify if their conditions are occupationally
12 related and that they could be the result of bronchiolitis
13 obliterans with obstructive pneumonia, BOOP. Further
14 investigation is needed to clarify this issue. Dr. Brooks
15 stated that if these bronchiolitis obliterans are found to be
16 occupationally related, it would be associated with a previously
17 unidentified exposure. In other words, it would be identified
18 as a new disease in the medical community because occupational
19 bronchiolitis obliterans has only been associated with exposure
20 to massive concentrations of highly destructible gases such as
21 sulfur dioxide.

22 In formulating your opinions in this case, sir, you
23 reviewed this document, didn't you?

24 A. I did.

25 Q. Now I'd like to look at Trial Exhibit 132. Now, yesterday

1 you talked about Dr. Brooks, and you had some very kind words to
2 say about him. You recall that?

3 A. No.

4 Q. You testified that he trained most of the lung doctors in
5 Cincinnati?

6 A. That's correct.

7 Q. And Mr. McClain in his opening statement said that
8 Dr. Brooks was a world-renowned occupational physician. You'd
9 agree with that, wouldn't you?

10 A. He's known around the world, yes.

11 Q. And he's written a textbook?

12 A. I wasn't sure about that yesterday. I think that's
13 probably true.

14 Q. But you would agree he's very knowledgeable as an --
15 occupational medicine; right?

16 A. Yes.

17 Q. Now, he came out to the plant in May of 1994; right?

18 A. Yes.

19 Q. And yesterday someone, either Mr. McClain or you, indicated
20 that he was in Cincinnati, but in this report it looks like at
21 that time he was at the University of South Florida; is that
22 right?

23 A. Yeah, he was transitioning to South Florida at this time.

24 Q. And they hired Mr. -- Dr. Brooks to see if they could find
25 out the cause of the problem at the plant; true?

1 A. I'm not sure.

2 Q. Looking at the first paragraph, he was contacted by
3 Dr. John Hochstrasser about a possible work-related respiratory
4 health problem of some employees; right?

5 A. That's correct.

6 Q. And Dr. Brooks says initially it was believed by Tastemaker
7 that there were at least two employees and possibly a third with
8 bronchiolitis obliterans; true?

9 A. That's correct.

10 Q. And then Dr. Brooks says there are at least three known
11 causes of bronchiolitis obliterans: Post-infectious, toxic
12 fumes or gas inhalation or idiopathic or unknown. The latter
13 category is often associated with other medical conditions such
14 as connective disease disorder, post-lung transportation (sic).
15 Some cases are completely unknown. For the Tastemaker setting,
16 category number 2 is the most appropriate consideration, but
17 epidemic viral infection is a possibility.

18 You reviewed this section of this report in
19 formulating your opinions in this case; correct?

20 A. I read the whole report, yes.

21 Q. And then Dr. Brooks says reported exposures include oxides
22 of nitrogen, sulfur dioxide, ammonia, chlorine, and phosgene
23 gases; right? That's what Dr. Brooks said?

24 A. You read that correctly. That's part of what he said.

25 Q. Now let's see what Dr. Brooks did in his investigation of

1 the plant. First of all, Dr. Brooks toured the entire plant;
2 correct?

3 A. That's correct.

4 Q. He met with a number of employees?

5 A. That's correct.

6 Q. He met with a number of executives?

7 A. That's correct.

8 Q. He met with the team we talked about that were
9 investigating the problem: Hochstrasser, Higley, Karen Duros;
10 right?

11 A. Yes.

12 Q. And he talked to local physicians, Joseph Thorpe, Robert
13 Baughman, and Grady Campbell; right?

14 A. That's correct.

15 Q. And then Dr. Brooks reviewed the world's literature on
16 bronchiolitis obliterans; right?

17 A. That's correct.

18 Q. And yesterday you talked about Ann Midaugh. Do you recall
19 that testimony?

20 A. Yes.

21 Q. And Dr. Brooks went out and spoke with Dr. Ann Midaugh;
22 right?

23 A. I don't know if he met with her or called her on the phone.
24 I don't recall.

25 Q. But anyway, she's an occupational medicine physician in

1 Cincinnati?

2 A. That's correct.

3 Q. And at least Dr. Brooks indicated she was familiar with
4 Tastemaker and had examined at least one employee; right?

5 A. That's correct.

6 Q. And then Dr. Brooks contacted several of the top U.S.
7 researchers and experts in occupational lung diseases and
8 bronchiolitis obliterans about occupational associations; right?

9 A. That's correct.

10 Q. And then he went on a plant tour and looked at all the
11 operations that were going on at the plant; right?

12 A. That's correct.

13 Q. And one thing about the plant operation was that an
14 employee on any given day or week could be making a number of
15 different flavors on one particular day of the week; is that
16 right?

17 A. That's correct.

18 Q. So it wasn't like the plant where somebody would just make
19 butter flavoring all the time; right?

20 A. That's correct.

21 Q. So one employee actually could be making butter flavoring,
22 vanilla, all the other flavors we talked about the other day.

23 A. That's correct.

24 Q. Because he'd be given a formula, and they'd take the
25 formula, and then he'd make the product; right?

1 A. Right. Certain workers were not exposed to certain
2 chemicals and were exposed to other chemicals. So they weren't
3 all exposed to everything.

4 Q. And then Dr. Brooks then reviewed all the MSDSs at the
5 plant; right?

6 A. Correct.

7 Q. And he failed to identify a product or chemical that was a
8 known cause of bronchiolitis obliterans; correct?

9 A. That's correct.

10 Q. Then he said there were a number of chemicals that are
11 known to cause occupational asthma, a condition which may
12 simulate bronchiolitis obliterans; correct?

13 A. Yes.

14 Q. And then Tastemaker shared patient information with
15 Dr. Brooks; right?

16 A. No.

17 Q. Detailed medical information was made available on five
18 employees; right?

19 A. That's correct.

20 Q. And Dr. Brooks contacted treating physicians and obtained
21 additional information on these individuals; right?

22 A. That's correct.

23 Q. And then he also reviewed information on 29 other
24 individuals at the plant; right?

25 A. That's correct.

1 THE COURT: Mr. Meador, could we take our stretch
2 break now?

3 MR. MEADOR: That'd be great, Your Honor.

4 THE COURT: Okay. Thank you.

5 Okay. Thank you. Please be seated.

6 Any time you're ready. Thank you.

7 MR. MEADOR: Sorry, Your Honor. I was daydreaming.

8 THE COURT: That's okay. I've been known to do that
9 too.

10 BY MR. MEADOR:

11 Q. Dr. Egilman, when you had patients, you would respect their
12 privacy and confidentiality, wouldn't you?

13 A. Yes.

14 Q. You wouldn't just take those records and give them to third
15 parties without your patients' permission, would you?

16 A. Unless there was a compelling legal reason. There are some
17 diseases that are reportable, particularly occupational
18 diseases. In Ohio, for example, there's a law that says you
19 have to report them to the state health department.

20 Q. Let's go back to Dr. Brooks' report. Conclusions and
21 recommendations, Dr. Brooks says there appears to be an
22 unusually high number of employees with either suspected or
23 confirmed bronchiolitis obliterans. Is that what he said?

24 A. You read that correctly.

25 Q. An epidemic bronchiolitis obliterans of occupational origin

1 has not previously been described. That's what he said; right?

2 A. You read that correctly. That's part of what he said.

3 Q. And then he -- fourth -- recommendation number 4, it is
4 recommended that an occupational health program be initiated by
5 Tastemaker and that medical personnel be identified to help with
6 this organization; correct? That was his recommendation?

7 A. That was one of his recommendations.

8 Q. I'll get -- in number 4; right?

9 A. Yes.

10 Q. And after his report, in fact, Tastemaker did retain
11 Dr. McKay, Dr. Lockey, and Dr. Pinney; right?

12 A. For a short period, yes.

13 Q. And Dr. Lockey was the one setting up the medical
14 surveillance program; right?

15 A. Well, the original plan for that was Brooks, and then
16 Lockey and McKay set one up after Brooks.

17 Q. Right. They were local in Cincinnati, weren't they?

18 A. That's correct.

19 Q. And they set up the medical surveillance program, and they
20 set up with Dr. McKay a respiratory protection program; right?

21 A. That's correct.

22 Q. So this recommendation that Dr. Brooks made was followed;
23 correct?

24 A. Not correct.

25 Q. Then he goes on to say, "It is highly recommended that an

1 epidemiologic investigation be conducted to address at least two
2 questions: Is there an excess of obstructive lung disease among
3 current Tastemaker employees?" So this is 1994; right?

4 A. That's correct.

5 Q. And Dr. Brooks is suggesting that they have -- initiate a
6 study to find out if they had an excess of lung disease at the
7 plant.

8 A. In this paragraph, that's correct.

9 Q. Then he'd also want to do a study are there workplace
10 exposures that are affecting persons who have abnormal lung
11 function or who note respiratory complaints; right?

12 A. That's correct.

13 Q. So at this point in time, Dr. Brooks was saying let's
14 investigate to see if there are even workplace exposures causing
15 problems at the plant; right?

16 A. That was what he wrote in the second -- in other
17 recommendations as well.

18 Q. And you know that from reading the documents that
19 Tastemaker decided not to continue to initiate a study that was
20 going to look at whether there was an excess of obstructive lung
21 disease or it was related to workplace. What they decided to do
22 was initiate the medical surveillance program, update the
23 respiratory protection program, and update the industrial
24 hygiene at the plant; correct?

25 A. You mean in terms of what they planned to do at that time?

1 Q. Yeah.

2 A. Yes. They told -- they terminated Brooks and didn't go
3 along with his recommendations for how to examine the cause, and
4 they initiated a respirator program and made some beginning
5 industrial hygiene changes in the plant.

6 Q. Yeah. They did make industrial hygiene changes at the
7 plant; right?

8 A. Some minor ones, yes.

9 Q. Now, I know Dr. Brooks feels like he was terminated, but
10 Tastemaker hired three experts to continue to assist them with
11 their investigation at the plant; right?

12 A. Not exactly, no.

13 Q. Is there anything in Dr. Brooks' report in 1994 that
14 indicates that diacetyl was a cause of bronchiolitis obliterans?

15 A. No.

16 Q. In fact, in his report did he indicate any chemical was the
17 cause of bronchiolitis obliterans at the plant?

18 A. That's correct. He named no particular chemical, nor did
19 he indicate that he was given information that Hochstrasser had
20 identified diacetyl as a likely cause.

21 MR. MEADOR: Move to strike as nonresponsive.

22 THE COURT: Overruled.

23 BY MR. MEADOR:

24 Q. Now, Dr. Lockey was hired in 1995; right?

25 A. That's correct.

1 Q. And Dr. Lockey was investigating the cause of the problems
2 at the Carthage plant; right?

3 A. That's correct.

4 Q. And at some point in time in '96 he told Tastemaker that
5 he'd identified the problem as a chemical not in butter
6 flavoring, a chemical called acetaldehyde; is that right?

7 A. He thought that was the most likely cause, that's correct.

8 Q. And isn't it true from your review of all the documents in
9 this case that Dr. Lockey never advised Tastemaker in the '95,
10 '96, '97 time period that diacetyl was the actual cause of any
11 of the problems at the plant?

12 A. That's correct.

13 Q. And Dr. Lockey or none of the other experts advised
14 Tastemaker they had to change any of their MSDSs; is that true?

15 A. That's correct.

16 Q. And no one advised Tastemaker that they needed to contact
17 customers to talk about problems at the plant; is that right?

18 A. That's correct.

19 Q. Now, you testified about MSDSs yesterday. Recall that
20 testimony?

21 A. Yes.

22 Q. And it's fair to say that you've never actually drafted
23 your own MSDSs; right?

24 A. That's correct.

25 Q. Now, do you know who Thomas Bates is?

- 1 A. You'll have to give me a clue.
- 2 Q. Works at IFF?
- 3 A. Ah. I think so, yes.
- 4 Q. And IFF is -- who is IFF?
- 5 A. IFF is International Flavorings and Fragrances, a large
- 6 flavorings company.
- 7 Q. In fact, do you know the attorney who works there, Frank
- 8 Woodside?
- 9 A. Sure. He used to represent me.
- 10 Q. Now, yesterday -- let's go -- yesterday Mr. McClain showed
- 11 you an MSDS that he said was in the Tastemaker file. Do you
- 12 recall that?
- 13 A. No, I don't -- he didn't say where it was from.
- 14 Q. If you'd look -- well, first of all, you see this is an
- 15 MSDS for diacetyl; right?
- 16 A. Correct.
- 17 Q. And then it says Bates, Thomas; true?
- 18 A. Correct.
- 19 Q. And that's the IFF person we were talking about?
- 20 A. Oh, this is an IFF document.
- 21 Q. So this document doesn't indicate that this particular MSDS
- 22 went to Tastemaker; is that right?
- 23 A. That's correct.
- 24 Q. Now, you know what international chemical safety cards are,
- 25 don't you?

1 A. Yes.

2 Q. In the first paragraph it says the international chemical
3 safety cards offer essential health and safety information on
4 chemicals to promote their safe use. They are intended to be
5 used at the shop floor level by workers and employers in
6 factories, agriculture, construction, and other places of work,
7 being particularly useful in less developed areas and in small
8 and medium enterprises. They are also designed to be part of
9 education and training activities. Is it your understanding
10 that's what these cards are for?

11 A. Yes.

12 Q. Let's go to TRX 3165.

13 Now, this is the international chemical safety card
14 for diacetyl; right?

15 A. I don't know that.

16 MR. MCCLAIN: Your Honor, then I object. Lacks
17 foundation.

18 MR. MEADOR: It's in evidence.

19 MR. MCCLAIN: Well, the witness doesn't know anything
20 about it.

21 THE COURT: Well, it's not actually a foundation
22 objection. He either knows or he doesn't know, so objection's
23 overruled.

24 BY MR. MEADOR:

25 Q. Now, do you see where it says diacetyl on the safety card?

1 A. Yes.

2 Q. And it was peer reviewed on October 26, 1994; right?

3 A. Correct.

4 Q. And you explained peer review yesterday; right?

5 A. No.

6 Q. That's when other scientists look at it and approve the
7 information that goes in a particular document?

8 A. Well, not exactly, no.

9 Q. Okay. Why don't you explain to me what peer review is.

10 A. That's a long answer. I'll try and give you the short --
11 the abridged version.

12 Peer review generally means that a document or an
13 article or a study is looked at by other scientists who
14 generally don't get to look at the underlying data, but they do
15 evaluate whether it's internally consistent. So for that reason
16 in the journal business, it's not infrequent that people can
17 successfully publish completely fraudulent data, and that's
18 happened even in the most prestigious journals over and over
19 again.

20 So peer reviewers don't look at the underlying data.
21 And the amount of work they do, they're almost always volunteer.
22 They usually spend for the most prestigious journals two to
23 three hours looking at a document or evaluating a document. So
24 it is given much more credence than it deserves in terms of
25 giving a stamp of approval on a particular document.

1 Q. On the top of this document, it actually says NIOSH; right?

2 A. That's one of the organizations, yes.

3 Q. And let's go down where it says inhalation, and there's a
4 column that says prevention, and it says ventilation, local
5 exhaust, or breathing protection; correct?

6 A. Correct. You read that correctly.

7 Q. And then it says for first aid if you're exposed to
8 diacetyl get fresh air and rest; right?

9 A. That's correct.

10 MR. MEADOR: I'd like to see TRX . . .

11 Q. You see at the top where it says this is another safety
12 card for diacetyl?

13 A. That's correct.

14 Q. And again, NIOSH is one of the organizations; true?

15 A. That's correct.

16 Q. And then it says November 23, 2007, validated; right?

17 A. Correct.

18 Q. And then it says inhalation, prevention, ventilation, local
19 exhaust, or breathing protection; right?

20 A. Correct.

21 Q. And again under first aid it says fresh air, rest, and then
22 refer for medical attention; true?

23 A. Correct. You read that correctly.

24 Q. And then on page 3 of this document, it says, "Workers
25 exposed to this substance in conjunction with other substances

1 have been found to be at an increased risk of bronchiolitis
2 obliterations. However, the evidence is inadequate at this time to
3 conclude that it is this specific substance that is responsible.
4 Health effects of exposure to the substance have not been
5 investigated adequately. Environmental effects from the
6 substance have not been investigated adequately." Is that what
7 the safety card was saying in 2007?

8 A. You read it correctly.

9 Q. Now let's go back and look at the Tastemaker MSDS that you
10 talked about yesterday which is TRX 1882. And yesterday you
11 only showed us part of this document; right?

12 A. That's correct.

13 Q. And when you look at an MSDS, you want to look at the whole
14 document so you understand what type of protections to take;
15 right?

16 A. If it's there, that's correct.

17 Q. I mean, you would anticipate an industrial hygienist at a
18 plant, the person trained to read MSDSs, would read the whole
19 MSDS before initiating a protection plan for the workers; right?

20 A. That's correct.

21 Q. Let's take a look at it. It says health hazard data.
22 First of all, permissible exposure limit, PEL, there isn't one,
23 is there?

24 A. That's correct.

25 Q. There wasn't one in '91?

1 A. And there still isn't one now.

2 Q. And then threshold limit value, TLV, not established?

3 A. Correct.

4 Q. And there wasn't one in '91?

5 A. And there isn't one now.

6 Q. And then it says possible routes of entry: Skin, eyes,
7 ingestion, inhalation of vapors; right?

8 A. Correct.

9 Q. And then under inhalation, it says, "Inhalation is
10 irritating to nose, throat, and lungs"; right?

11 A. Yes.

12 Q. And then there's a section called applicable control
13 measures; right?

14 A. Correct.

15 Q. This is a section that although an industrial hygienist
16 would read the entire document, this is one section he'd focus
17 on to think about how he'd set up the plant ventilation and
18 protect workers; right?

19 A. This is one thing he'd consider, yes, or she.

20 Q. In this section under appropriate hygienic practices, it
21 says, "Avoid contact with eyes, skin, and clothing. Wash
22 thoroughly after handling. Avoid breathing fumes"; right?

23 A. You read that correctly.

24 Q. And then engineering controls. Now, engineering controls
25 can mean things like ventilation; correct?

- 1 A. Correct.
- 2 Q. You can have local ventilation; right?
- 3 A. That's correct.
- 4 Q. You can have general ventilation; true?
- 5 A. That's correct.
- 6 Q. Now, under engineering controls, it says, "Provide adequate
7 ventilation"; right?
- 8 A. That's correct.
- 9 Q. Now, we were talking about Dr. Lockey a few minutes ago.
10 And he told Tastemaker he thought it was acetaldehyde; right?
- 11 A. That's what he thought the most likely substance was.
- 12 Q. And then he -- Trial Exhibit 461. This is an abstract from
13 Dr. Lockey in the year 2002; right?
- 14 A. That's correct.
- 15 Q. So this is actually after Jasper and the NIOSH
16 investigation; right?
- 17 A. That's correct.
- 18 Q. And in 2002 Lockey still identifies acetaldehyde as the
19 cause of bronchiolitis obliterans; right?
- 20 A. That's correct. Well, as it -- why don't you show them.
21 Not exactly correct.
- 22 Q. I want to be exactly correct. The causes of BO range from
23 infectious agents, toxic gases, fumes, mists or dusts,
24 connective tissue --
- 25 A. I can't -- can you just wait one second? If you're going

1 to ask me if you read it correctly, I gotta be able to read it.

2 Okay. Where are you reading from?

3 Q. The causes -- two sentences before the highlight.

4 A. Go ahead.

5 Q. The causes of BO range from infectious agents, toxic gases,
6 fumes, mists or dusts, connective tissue disorders, complication
7 from heart/lung transportation (sic) as well as idiopathic. An
8 index case of BO was identified in a worker involved in the
9 food-flavoring manufacturing industry. A subsequent survey of
10 the workforce identified an additional four workers with
11 clinical findings consistent with BO. A comprehensive review of
12 the work site identified multiple agents within the
13 food-flavoring industry as potential causative agents and most
14 prominently acetaldehyde.

15 Now, my question is is the only chemical identified
16 directly by Dr. Lockey in 2002 was acetaldehyde; is that right?

17 A. The only one he names is acetaldehyde, that's right.

18 Q. Now, I'd like to move to a different topic. Now, we've
19 talked about Tastemaker and Givaudan, and I want to put that
20 story aside, and let's go to the final pretrial conference
21 order, page 5, number 33.

22 Now, in this case we've entered in a stipulation with
23 Mr. McClain that will be read to the jury later, and this
24 stipulation is important. Prior to an August 1, 2002, study
25 published in the New England Journal of Medicine called

1 "Clinical Bronchiolitis Obliterans in Workers At a Microwave
2 Popcorn Plant," it was not known in the general medical or
3 scientific communities that there could be any connection
4 between using butter flavoring containing diacetyl and the
5 potential for that lung disease.

6 Now, the article referred to in the stipulation
7 relates to the investigation in Jasper, Missouri; is that right?

8 A. That's correct.

9 Q. And the author who wrote this -- one of the authors is
10 Kreiss?

11 A. Kay Kreiss, that's correct.

12 Q. Kay Kreiss? Now, even though this is the first published
13 literature on the subject, it didn't answer all the questions
14 about whether there's any connection between diacetyl or butter
15 flavoring in bronchiolitis obliterans; is that true?

16 A. That's true.

17 Q. Let's look a little bit more at the article. Let's look at
18 TRX 834. This is a copy of the article?

19 A. That's correct.

20 Q. Now, in the report it says, "Analysis of air samples from
21 the mixing room identified more than a hundred volatile organic
22 compounds. There were no known occupational causes of
23 bronchiolitis obliterans identified among these compounds or in
24 the plant at large."

25 Now, when it says there were more than a hundred

1 volatile organic compounds, she was talking about more than a
2 hundred volatile organic compounds in the air at the plant at
3 Jasper; right?

4 A. That's correct.

5 Q. In fact, that's what makes some of these investigations so
6 difficult because there's a number of different chemicals,
7 solvents, and other substances used at a plant that can be
8 emitted in the air; correct?

9 A. That's not what made this difficult, no.

10 Q. Well, I'm not -- okay. But she identified there's more
11 than a hundred volatile organic compounds in the mixing room;
12 right?

13 A. That's correct.

14 MR. MCCLAIN: Under the rule of completeness, could we
15 read the rest of that sentence?

16 THE COURT: Yes.

17 MR. MCCLAIN: Diacetyl, 2,3-butanedione, a ketone with
18 butter flavor characteristics, was the predominant compound
19 isolated from air samples.

20 BY MR. MEADOR:

21 Q. And then at the end of the article she says, "Although many
22 questions remain about the specific agents involved and about
23 safe and unsafe levels of exposure, prevention is possible on
24 the basis of the current findings." This is consistent with
25 your prior testimony that there were still a lot of questions

1 about the relationship between butter flavoring and diacetyl?

2 A. No, this is consistent with my prior testimony where he
3 said that you didn't have to identify the exact substance before
4 you prevent a disease since a supplied air respirator would
5 prevent exposure to all of the organic substances and you could
6 do that as they did it without identifying the particular
7 chemical compound.

8 Q. Thank you. Now, even though we have our stipulation as to
9 what the first published literature was, yesterday you talked
10 about a 1986 NIOSH report related to International Bakers.

11 A. That's correct.

12 Q. Correct? And at International Bakers, NIOSH concluded that
13 they were unable to identify a specific cause of the workers'
14 illnesses at that bakery; correct?

15 A. That's correct.

16 Q. And so NIOSH recommended that since they couldn't figure
17 out the cause you should control the exposures; true?

18 A. That's correct.

19 Q. And part of the reason why they couldn't identify which
20 agent it was, because there were 48 different chemicals used at
21 that plant; right?

22 A. That's part of the reason, yes.

23 Q. And one of the things they were primarily focused on in
24 that study actually was mold and dust as a possible source of
25 the problem; right?

1 A. They looked at mold and dust and a variety of other things,
2 yes.

3 Q. In fact, they looked at 500 different sources; right?

4 A. Hundreds. I don't remember if it was 500.

5 Q. Hundreds. They looked at everything they could at the
6 plant; right?

7 A. I think so.

8 Q. And ultimately they concluded -- Trial Exhibit 506 -- none
9 of the chemical ingredients used in the mixes are known causes
10 of bronchiolitis or emphysema. You reviewed this in formulating
11 your opinions, didn't you, sir?

12 A. The whole document, yes.

13 Q. And in conclusion they concluded no specific etiology of
14 the workers' illnesses was identified; right?

15 A. That's part of what's there. You read that correctly.

16 Q. And what they conclude in that report in the absence of a
17 specific identified etiology for the two cases of severe
18 obstructive lung disease, every attempt should be made to
19 control airborne dust in the mixing room; right?

20 A. That's exactly correct.

21 Q. Let's go to TRX 922. Let's wait on that actually.
22 Yesterday you talked about this BAS study. You recall that?

23 A. BASF, yes.

24 Q. And you indicated that it was written in 1993.

25 A. Correct.

1 Q. But isn't it true that that study wasn't available to the
2 public or to FEMA until 2001?

3 A. No.

4 Q. Okay. Let's see TRX 922. It says, "Attached hereto are
5 two pages of records from the files of RIFM, FEMA database
6 relating to the diacetyl monograph which shows that the
7 unpublished BAS 1993 study on the acute inhalation toxicity LC50
8 of diacetyl as a vapor in rats, 4-hour exposure, parentheses,
9 BASF, 1993, was first received by RIFM on October 19, 2001, was
10 sent to RIFM toxicologist on October 23, 2001, and was
11 thereafter available to users of the RIFM database after October
12 28, 2001."

13 In formulating your opinions in this case, you
14 reviewed this document, didn't you, sir?

15 A. Yes.

16 Q. Now, yesterday you talked about the Hubbs study. Do you
17 recall that testimony?

18 A. Yes.

19 Q. And the Hubbs studies were testing giving high
20 concentrations to rats; right?

21 A. Relative to workers they're about the same concentration as
22 the mixing workers go.

23 Q. And the problem with using rats is they actually don't get
24 bronchiolitis obliterans; is that true?

25 A. They don't get the similar disease, that's right.

1 Q. And the results they found in the Hubbs study -- which, by
2 the way, that was 2002; right?

3 A. Correct.

4 Q. First Hubbs.

5 A. Correct.

6 Q. And so that was after the New England Journal article we
7 talked about before.

8 A. No, I think there was a reference to it in the New England
9 Journal article.

10 Q. It's about the same time. They're both 2002?

11 A. Correct.

12 Q. And the results of the Hubbs studies is there was damage in
13 the rats that was limited to the nasal and upper airways; is
14 that right?

15 A. Right. Upper bronchus was involved as well as the nasal
16 and sinuses.

17 MR. MEADOR: Just a minute, Your Honor.

18 Q. Now, in this case you know we have an expert Dr. James
19 Stewart; right?

20 A. Yes.

21 Q. And you've read his reports?

22 A. He's a hygienist.

23 Q. Industrial hygienist?

24 A. Correct.

25 Q. And you've seen his testimony where he's concluded that the

1 MSDSs of my client are adequate; right?

2 A. No, I didn't read his testimony.

3 Q. So you haven't read his reports or testimony?

4 A. I read his report. I didn't read his testimony.

5 Q. Now, yesterday you talked about in 1997 how Tastemaker went
6 to talk to FEMA. Do you recall that testimony?

7 A. '96 they went to talk to them.

8 Q. '96.

9 A. Yes.

10 Q. And Dr. Lockey went with Nancy Higley?

11 A. Correct.

12 Q. And the purpose of going to see FEMA in '96 was to tell
13 FEMA that in general there had been a problem at one of the
14 flavoring plants, right, with bronchiolitis obliterans?

15 A. It's not my understanding, no. My understanding is the
16 purpose was to find out if anybody else was having a problem.

17 Q. And FEMA went out and talked to all their members and
18 reported that there wasn't a problem; right?

19 A. Hallagan called people up, and no one else reported having
20 similar cases I think. That's correct.

21 Q. Now, Dr. Egilman, in this case you've testified at
22 deposition that the MSDSs that Sensient supplied to American Pop
23 Corn were defective; right?

24 A. In certain ways, yes.

25 Q. And you've also testified that the MSDSs that International

1 Flavor and Fragrances provided to American Pop Corn were
2 inadequate; right?

3 A. During this time period, yes.

4 Q. And you also --

5 A. In other words, the time period when he was exposed I would
6 have looked at.

7 Q. And you've also testified that the MSDSs provided to -- I'm
8 sorry, provided by FONIA to American Pop Corn were inadequate;
9 true?

10 A. In certain respects, yes.

11 Q. In fact, you've testified that all suppliers' MSDSs were
12 inadequate.

13 A. I don't think so.

14 MR. MEADOR: Egilman deposition, this is May 10, 2007,
15 page 198, lines 3 through 10.

16 (Videotaped deposition excerpt of David Egilman was
17 played in open court.)

18 THE COURT: That's a different question than what you
19 asked him, so you gotta be real careful.

20 MR. MEADOR: Okay.

21 THE COURT: Because you asked him about all suppliers.
22 You didn't qualify it with regard to what they supplied. They
23 could have supplied paperclips.

24 MR. MEADOR: Okay. Let's go Trial Exhibit 1046.

25 THE COURT: Just to try and clarify things, why don't

1 you go back and ask him. I think what you're intending to ask
2 but, you know, it's for you to decide is not paperclips but
3 butter flavoring, suppliers of butter flavorings. I think
4 that's what you were asking, but it's your question, but it --

5 BY MR. MEADOR:

6 Q. Doctor --

7 THE COURT: You know, the problem is -- just a second.
8 The problem is what you showed in his deposition was a different
9 question than what you asked him in court, so it really wasn't
10 fair attempted impeachment because you have to ask the identical
11 question or something very closely similar.

12 MR. MEADOR: Yeah, I should have shown him further up.
13 I understand, Your Honor.

14 THE COURT: Or I think you should have qualified what
15 you meant by the word supplier because a paperclip that American
16 Pop Corn has is supplied by somebody, but I don't think they're
17 required to supply a -- the MDMS form -- yeah, the MSDS form.
18 So just to clarify it so that the trier of fact can understand,
19 why don't you reask the question with regard to what you mean
20 about suppliers.

21 MR. MEADOR: Thank you, Your Honor. I will, Your
22 Honor.

23 BY MR. MEADOR:

24 Q. I was asking questions at that deposition, wasn't I?

25 A. Yes, you were asking -- that was you -- your voice on the

1 video.

2 Q. And you have testified in this case and a number of cases
3 that all the suppliers of butter flavoring in the 1990s, that
4 their MSDSs were defective.

5 A. I don't think so. That's not what I said there. What I
6 said of the ones I reviewed in this case were generally
7 inadequate. I said what I said. I mean, I said the MSDSs I've
8 seen in this case were generally inadequate. That's my opinion
9 now, and that was what I said then.

10 Q. Thank you. Let's go to document TRX 1046. We've talked
11 about this before, Dr. Egilman. This is your report dated
12 January 12, 2007; right?

13 A. That's correct.

14 Q. Now let's go to your diagnosis section, please. Okay.
15 Let's start at the top. See where it says bronchiolitis
16 obliterans and go under there? This is a report for Mr. Kuiper;
17 right?

18 A. That's correct. There's a typo in it. We'll get there I
19 guess.

20 Q. Okay. Let's go down to that typo. You say, "There's no
21 evidence that Mrs. Foth had any severe lung infection that might
22 have caused her BO, and steroid treatment has not worked. Thus
23 I rule out these causes." Mrs. Foth is not Mr. Kuiper; right?

24 A. No, she's Mrs. Stillmunkes from another case. I was doing
25 both reports I think around the same time.

1 Q. Isn't it true that you just cut and paste your analysis of
2 Mr. Kuiper from another report that you prepared for Mrs. Foth?

3 A. No, but the language is the same.

4 MR. MEADOR: I don't have any more questions. Thank
5 you.

6 THE COURT: Well, I think now would be a good time to
7 take our mid-morning recess. We'll be in recess until 10:30.
8 Remember to keep an open mind till you've heard all of the
9 evidence in the case. Thank you.

10 (The jury exited the courtroom.)

11 THE COURT: Anything we need to take up?

12 MR. MEADOR: No, Your Honor.

13 THE WITNESS: May I stand down, Your Honor?

14 THE COURT: You may.

15 Mr. McClain, anything we need to take up at this time?

16 MR. MCCLAIN: No.

17 THE COURT: Okay. See you back at 10:30. Thank you.

18 (Recess at 10:03 a.m.)

19 THE COURT: Mr. McClain, ready to have the jury
20 brought in?

21 MR. MCCLAIN: Mr. Britton-Mehlis just ran to the
22 restroom. We'll be ready I think.

23 THE COURT: Well, remember what I told you in the
24 e-mail?

25 MR. MCCLAIN: He's right here.

1 THE COURT: Okay.

2 MR. MCCLAIN: He was here.

3 (The jury entered the courtroom.)

4 THE COURT: Thank you. Please be seated.

5 Mr. McClain?

6 MR. MCCLAIN: Yes, Your Honor.

7 THE COURT: You may proceed. Thank you.

8 MR. MCCLAIN: Thank you.

9 REDIRECT EXAMINATION

10 BY MR. MCCLAIN:

11 Q. Dr. Egilman, I want to go over several of these things that
12 Mr. Meador talked to you about. The first is he started out
13 yesterday by claiming that you were not on Brown's website. Do
14 you remember that?

15 A. Yes.

16 MR. MCCLAIN: Your Honor, this is an exhibit number
17 which we have added for a rebuttal exhibit. Is it all right if
18 I just announce it?

19 THE COURT: Announce what now? The number?

20 MR. MCCLAIN: The number. What it is is Brown's
21 website that we went on last night because a question was raised
22 about it in court yesterday as to whether or not he's on the
23 website.

24 THE COURT: Oh, okay.

25 MR. MCCLAIN: So I'd like to introduce that as an

1 exhibit since it was raised in --

2 THE COURT: Yeah. Well, what's the number?

3 MR. MCCLAIN: It's 2176, Your Honor, and then the
4 syllabus list also on the website for his courses are 2177 and
5 2178.

6 THE COURT: Any objection?

7 MR. MEADOR: No, Your Honor.

8 THE COURT: Okay. So 2176, 2177, 2178 are admitted.

9 * * * *

10 (Exhibits 2176, 2177, and 2178 were admitted.)

11 * * * *

12 MR. MEADOR: I said no, Your Honor. If I could at
13 least look at them?

14 THE COURT: Oh, sure.

15 MR. MEADOR: Your Honor, now I've looked at them. I'd
16 like to object to the last one, the syllabus. I don't see how
17 that's rebuttal to anything. I didn't suggest he didn't teach
18 any classes. I mean, he does teach classes.

19 MR. MCCLAIN: Yeah, that was the suggestion I believe.

20 MR. MEADOR: No. He actually answered in detail about
21 the cl --

22 THE COURT: Well, remember what I said about speaking
23 objections?

24 MR. MEADOR: Excuse me, Your Honor.

25 THE COURT: That's okay. But that would qualify as

1 one. You may proceed. Twenty -- all three exhibits are
2 admitted.

3 MR. MCCLAIN: Thank you. And, Scott, do we -- can I
4 turn this on here? Yes. Okay.

5 BY MR. MCCLAIN:

6 Q. Is this available on the website currently, Dr. Egilman?

7 A. Yes.

8 Q. And you identified yourself yesterday as clinical associate
9 professor of community health, and that's what you are on the
10 website; is that right?

11 A. Right. If you look at the whole document, it's -- Brown is
12 on top. It's the Brown website search.

13 Q. Okay. Brown University.

14 A. Correct.

15 Q. And your syllabus in the community health program, 2177,
16 were the courses that you told us about yesterday?

17 A. Yes.

18 Q. And likewise, 2178.

19 A. Yes.

20 Q. And part of this course that you teach involves butter
21 flavor.

22 A. Yes.

23 Q. And the lessons that we've learned from the experience that
24 you told us about in regard to Givaudan and the other companies
25 involved in manufacture of butter flavor and the disease that's

1 resulted.

2 A. Yes.

3 Q. Now, the other thing that he started out with yesterday was
4 some question about whether Tastemaker and Givaudan and Fries &
5 Fries were all the same company. Do you remember those
6 questions?

7 A. Yes.

8 Q. And you reviewed the stipulation in this case before
9 testifying as he established?

10 A. Yes.

11 Q. I'd like to show you Exhibit -- the stipulation, paragraph
12 1. Stipulation of fact, for the purpose of this case only, the
13 parties stipulate to the following facts: For purposes of this
14 lawsuit, Givaudan Flavors Corporation agrees that it is
15 responsible for sales of butter flavoring to American Pop Corn
16 by Fries & Fries, Tastemaker, Givaudan Roure Flavors
17 Corporation, and Givaudan Flavors Corporation. Was that your
18 understanding?

19 A. Yes.

20 Q. And that's the basis that you proceed upon was the
21 stipulation of fact that counsel entered into.

22 A. Yes.

23 Q. Now, Dr. Egilman, he showed you a part of the record
24 that -- of the department of -- of the NIOSH survey that
25 Mr. Kuiper participated in. Do you remember that?

1 A. Yes.

2 Q. I want to show you a part of this.

3 MR. MCCLAIN: Scott, would you go to -- do you have
4 this loaded, Scott, the -- you don't have this one loaded?

5 Q. Dr. Egilman, he was asked specifically by the NIOSH
6 investigators when he started wheezing and wheezing away from
7 work and wheezing for 12 months. And when did he indicate that
8 the wheezing began?

9 A. 1993.

10 Q. And, Dr. Egilman, is it possible just to take bits and
11 pieces of these documents, or do you have to look at the whole
12 thing?

13 A. You have to look at all of the records.

14 Q. Yes. And NIOSH looked at this when concluding that
15 Mr. Kuiper was one of the people that had been affected by
16 butter flavoring in the mixing room; is that right?

17 A. Yes.

18 Q. And they specifically wanted to know about when the
19 wheezing began; is that right?

20 A. Yes, it was one of the questions.

21 Q. Because shortness of breath can be caused by a number of
22 things.

23 A. Yes.

24 Q. Now, by the way, Dr. Egilman, on this subject of looking at
25 the entire record, you reviewed Dr. Parmet's report?

1 A. Yes.

2 Q. Which is in more detail than your medical report because
3 the emphasis of your testimony was on other things; is that
4 right?

5 A. Yes.

6 Q. But Dr. Parmet lays out in his report --

7 MR. MCCLAIN: Is this loaded, Scott?

8 Q. Would you go over -- he talked about Dr. Fell's report.
9 Dr. Parmet reviewed that report, did he not?

10 A. He did. I don't think that was discussed in cross, though.

11 Q. He mentioned Dr. Fell. I can't remember what he said about
12 him, but he did mention him. He mentioned --

13 MR. MCCLAIN: Well, Scott, really I wanted to go to
14 the second -- I wanted to go where he talks about Dr. Fell's
15 1988 report. I think that that was specifically discussed by
16 Mr. Meador. I wanted to look -- there's pages of these
17 reports -- over to Dr. Zuehlke. He mentioned that one, 1996.
18 That was reviewed by Dr. Parmet, Dr. Zuehlke here. Dr. Farrell
19 he mentioned. There's a bunch of Farrell reports, Scott, but go
20 over to the 2-10, 2001. I think that was one that was
21 mentioned.

22 Q. He talked about Dr. Bainbridge, those reports. Look over
23 at the March 3, 2005, report from Dr. Bainbridge and a report by
24 Dr. Bainbridge in December of 2005. He reviewed all those
25 medical records as you did; am I right?

1 A. Yes.

2 Q. And his conclusion when taking all the evidence together
3 was found on page 13 of this report where he says that
4 bronchiolitis obliterans syndrome, this condition --

5 MR. MEADOR: I'm going to object to this, Your Honor,
6 on hearsay. I don't think this is an A exhibit. This is --
7 Dr. Parmet's going to come and testify.

8 MR. MCCLAIN: He was cross-examined, Your Honor, about
9 Dr. Parmet's report and whether he had read the report, and I'm
10 following up on his question.

11 MR. MEADOR: He can --

12 THE COURT: You can -- you can ask him about the
13 report, but it's not in evidence, if he relied on it.

14 MR. MCCLAIN: He did rely on it. The question --

15 THE COURT: Okay. Then you can ask him about the
16 report.

17 MR. MCCLAIN: Okay.

18 THE COURT: But it's not going to go in evidence.

19 MR. MCCLAIN: Right. And I was just --

20 THE COURT: Because under Rule 703, it doesn't have to
21 be admissible for him to rely on it.

22 MR. MCCLAIN: I understand.

23 BY MR. MCCLAIN:

24 Q. And did he conclude, that, in fact, he had bronchiolitis
25 obliterans syndrome caused by microwave popcorn butter flavor

1 exposure?

2 A. Can I look at it to be . . .

3 He said he had that related to exposure to flavorings
4 at the American Pop Corn facility.

5 Q. All right. And was that consistent with your conclusion?

6 A. Yes.

7 Q. And by the way, just so that we're clear, Dr. Egilman, one
8 of the records that Mr. Meador showed you from Dr. Bainbridge,
9 he showed you part of it.

10 MR. MCCLAIN: Scott, is this loaded, 1926, the 3-03-05
11 record?

12 Q. Dr. Bainbridge says, "Obstructive airways disease, very
13 severe. Differential would have to include microwave popcorn
14 lung." Is that true?

15 A. Correct.

16 MR. MEADOR: Can we read the rest of it for
17 completeness, Your Honor?

18 THE COURT: Yes.

19 BY MR. MCCLAIN:

20 Q. And we're going to get a high-resolution CT scan to see if
21 we can see lobules with obstruction; is that right?

22 A. That's part of what he wrote.

23 Q. And Dr. Bainbridge wrote --

24 MR. MCCLAIN: Scott, is this 2184 -- Your Honor, this
25 is a new exhibit added in rebuttal, 2184, a medical record from

1 Dr. Bainbridge from 1-16, 2009, just last month.

2 THE COURT: Well, what's your foundation for it?

3 MR. MCCLAIN: It's been stipulated to among counsel.

4 In fact, defense counsel produced it to us.

5 MR. MEADOR: It's --

6 THE COURT: Members of the jury, I really -- well, you
7 know, let's just do this at sidebar. Why don't you approach.

8 MR. MEADOR: Your Honor, we have no objection.

9 THE COURT: Oh, you have no objection? Okay. Fine.
10 You may proceed. And what number was that?

11 MR. MCCLAIN: It's 2184, Your Honor. It's the same
12 one I used in opening. That's why I didn't approach before I
13 used it, 2184.

14 THE COURT: Okay. Thank you. Well, then 2184's
15 admitted.

16 * * * *

17 (Exhibit 2184 was admitted.)

18 * * * *

19 BY MR. MCCLAIN:

20 Q. Just last month he wrote he has a history of exposure to
21 diacetyl in the mixing room of microwave popcorn, and
22 consequently, there are issues about the possibility of having
23 microwave popcorn lung. Is that what Dr. Bainbridge wrote just
24 last month?

25 A. Yes.

1 Q. Still his opinion.

2 MR. MEADOR: Calls for speculation.

3 THE COURT: Sustained.

4 BY MR. MCCLAIN:

5 Q. It's consistent with the opinion he expressed in the
6 previous record.

7 A. Yes.

8 Q. And consistent with your opinion.

9 A. Yes.

10 Q. Now, he also said something about chlorine, showed you a
11 medical record with a reference to chlorine. Do you recall
12 that?

13 A. Yes.

14 Q. I'd like first to look at the FFIDS that was in evidence
15 yesterday.

16 MR. MCCLAIN: Scott, would you? This is -- what's the
17 exhibit number, Scott? It's 714 in evidence. Would you go to
18 the paragraph regarding the characteristics of diacetyl,
19 appearance and odor, intense yellow or yellow green mobile
20 liquid with a very powerful and diffusive pungent buttery odor.
21 The vapors have a chlorine-like odor.

22 Q. Does diacetyl have a chlorine-like odor?

23 A. Yes.

24 Q. And so when Mr. -- when Mr. Kuiper reports having a
25 chlorine-like odor in his nose after being in a butter room,

1 Dr. Egilman, is it quite possible that that is the effect of
2 diacetyl?

3 A. Yes.

4 Q. That's one of the ways you know if you've been exposed to
5 diacetyl. It smells like chlorine; is that right?

6 A. Butter and -- chlorinated butter I guess, yes.

7 Q. And likewise, Exhibit 2025 which comes from Citrus &
8 Allied, one of the suppliers they identified yesterday in
9 Mr. Pagliaro's opening, says --

10 MR. MCCLAIN: Would you pull it up, Scott, second
11 page?

12 Q. Appearance, odor, and physical state. Intense yellow or
13 yellow green mobile liquid with a powerful and diffuse pungent
14 buttery odor. The vapors have a chlorine-like odor; is that
15 correct?

16 A. Yes.

17 Q. Now, then he asked you some que -- he showed you one record
18 and suggested that the medical doctors had found reversibility
19 and that hadn't he had asthma. Do you remember those questions?

20 A. Yes.

21 Q. Doctor, in the vast majority of tests that he has had, have
22 the doctors found reversibility or not found it?

23 A. In general I think he's had about 10 or 12 pulmonary
24 function tests. He had partial reversibility on two or three.
25 He never had complete reversibility where he came back within a

1 normal range.

2 Q. All right.

3 MR. MCCLAIN: Your Honor, this is Exhibit 1292 in
4 evidence. This is from Dr. Farrell's record of 11-16-92.

5 Q. Doctor, is this one of the records you reviewed, even after
6 bronchodilators he didn't do a lot better? Was that what
7 Dr. Farrell found?

8 A. Yes.

9 Q. And likewise, the record from 7 of '96, bronchodilators did
10 not give him much benefit. Is that a record you reviewed?

11 A. Yes.

12 Q. And then the reports of the actual test results that were
13 performed later, Doctor -- this is from Exhibit 1087 -- can you
14 see that, Doctor?

15 A. Yes, in 1992.

16 Q. And post-broncho -- can you interpret that for us?

17 A. Yes. Well, you need to look at both pre and post, but if
18 you look at both pre and post, you'd see that the forced
19 expiratory volume 1 which is the amount of air you get on the
20 first second which is evidence of obstruction, he's at 38
21 percent of predicted. Anything below 80 percent of predicted
22 would be considered abnormal. This is dramatically abnormal if
23 you think about it in quarts. The predicted means -- this
24 predicted means that he should have about 4 liters of lung
25 capacity come out in the first second, and he actually has 1.44,

1 so he's down about 2 1/4 quarts which is a considerable amount
2 in this lung function.

3 Q. And, Doctor, the bronchodilators didn't have the desired
4 effect; is that right?

5 A. Well, the diagnostic effect. You do it to make a diagnosis
6 in this case, and it did not diagnose -- they did not -- it did
7 not appear based on this test he had any reversibility or any
8 asthmatic component.

9 Q. All right. And then this record, Doctor, from the same
10 document from the same exhibits of his medical records -- the
11 Bates number at the bottom is 30 just so we can identify it for
12 the record -- likewise, this record, Doctor, taken November 16
13 of '92, did it show any reversibility?

14 A. It's the same one, isn't it?

15 Q. They were separate pages. I think that this one was
16 November 16, '92. I think that they're part of the same record.
17 That's the pre result that you were asking us to look at.

18 A. Okay. So this is -- right. So this is the pre. It's 38.
19 And if you look at the post, it was also 38, so there's no
20 change.

21 Q. Now, likewise, Doctor, the 1997 record from Exhibit 1457,
22 did it show any bronchodilator effect reversibility?

23 A. It showed some effect. That's the 7.5 percent. But it's
24 usually not considered by anybody to be a significant or
25 diagnostic effect until it's at least 8 percent. And you can

1 see that he had a 20 percent improvement in the total lung
2 capacity which is not affected by bronchodilator but is affected
3 by effort. And so when you're -- and when you're sick, you can
4 often get inconsistent results. Sick people tend to have much
5 more variability in the kind of test results you get because
6 they're sick.

7 Q. And, Doctor, this medical note from 1440 on 3-5-02, severe
8 obstructive lung disease with progression over the last 6 years
9 with no improvement post-bronchodilators from Dr. Bacon, one of
10 the doctors that Mr. Meador mentioned?

11 A. That's --

12 Q. That was his conclusion?

13 A. That's correct.

14 Q. And likewise, Mr. Meador's suggestion that there hasn't
15 been any progression, would that have been correct?

16 A. No.

17 Q. There is progression.

18 A. Oh, yes.

19 Q. So that's 2002, no bronchodilator effect.

20 And finally, Doctor, I think that this is the test
21 results from that -- from -- is that March of '02 that I just
22 showed you? Yes. It's the same record as the test results.

23 Now -- so, Doctor, looking at the entire medical
24 record, do you think he's got asthma?

25 A. No, he doesn't have asthma, and he doesn't have -- he

1 occasionally has reversibility, but it's hard to tell whether
2 it's because he's sick that day or giving a variable effort.
3 But for the most part he has what's called fixed obstruction
4 which means it doesn't get better with asthma medication. In
5 other words, it's fixed.

6 If you remember from the definition I gave of asthma,
7 the definition of asthma is it's reversible. It goes away with
8 treatment or you have some bad days and some days when you're
9 completely normal. And in his case, his amount of obstruction's
10 almost always permanent, not affected by treatments. And fixed
11 disease is very unusual.

12 Q. Doctor, now let's turn our attention to this whole idea
13 that I guess the import of it was they didn't know for sure --

14 MR. MEADOR: Object to form.

15 THE COURT: Overruled.

16 BY MR. MCCLAIN:

17 Q. Do you recall those questions, Doctor, where he was
18 suggesting they just didn't know, they were trying to find out
19 and they just didn't know?

20 A. Yes.

21 Q. Remember those questions? Doctor, you expressed an opinion
22 yesterday regarding the obligation of a chemical manufacturer,
23 supplier to know. Do you remember that testimony?

24 A. Yes.

25 Q. Doctor, is there a regulation of OSHA which is a standard

1 in the industry which you rely upon in rendering the opinion
2 that they have to know?

3 MR. MEADOR: Objection. Lacks foundation, calls for a
4 legal conclusion.

5 THE COURT: Overruled.

6 A. Yes.

7 Q. Is it generally referred to as the right-to-know
8 legislation?

9 A. It's the hazard communication standard from 1986 but . . .

10 Q. So it's been in existence since '86, before this whole
11 thing occurred, before the incident at Tastemaker occurred.

12 A. Yes.

13 Q. I'd like to read a section of that to you and ask you to
14 comment on it if you could. Would you put --

15 MR. MEADOR: Objection. Outside the scope of cross.

16 THE COURT: Overruled.

17 MR. MCCLAIN: Would you bring that up, Scott?

18 BY MR. MCCLAIN:

19 Q. It says, "The purpose of this section is to ensure that the
20 hazards of all chemicals produced or imported are evaluated and
21 that information concerning their hazards is transmitted to
22 employers and employees. This transmittal of information is to
23 be accompanied by means of comprehensive hazard communication
24 programs which are to include container labeling and other forms
25 of warning, material safety data sheets, and employee training."

1 So this is required under this regulation, this whole
2 scheme that we've talked about; is that right, Doctor?

3 A. Yes.

4 Q. And it's to ensure that the hazards of all chemicals
5 produced and imported are evaluated?

6 A. Yes.

7 Q. So it's not optional to evaluate them. It is required.

8 A. Yes.

9 Q. Let's go to another section on that issue that makes it
10 even clearer. Hazard determination, chemical manufacturers and
11 importers shall evaluate chemicals produced in their workplace
12 or imported by them to determine if they are hazardous.

13 Employers are not required to evaluate chemicals unless they
14 choose not to rely on the evaluation performed by the chemical
15 manufacturers or importers for the chemicals to satisfy this
16 requirement. Is that what you were telling us yesterday,
17 Doctor?

18 A. Yes.

19 Q. And, Doctor, is -- in this instance under the regulation,
20 is Givaudan a chemical manufacturer by definition?

21 MR. MEADOR: Objection. Calls for a legal conclusion,
22 lacks foundation.

23 THE COURT: Overruled.

24 A. Yes.

25 Q. And so they must, according to this, must evaluate or shall

1 evaluate their chemicals; is that right?

2 A. Yes.

3 Q. And so was it required of them based upon industry practice
4 and also public health principles to know what the health
5 effects were of diacetyl before they used it in a butter flavor?

6 A. Yes.

7 Q. Now, Doctor, is that the meaning of this document we looked
8 at yesterday?

9 MR. MCCLAIN: Would you bring that up, Scott? It's
10 the one that says if we find out we have to tell. I don't know
11 what number that was. Would you bring the number up? It's 115
12 I think, or is that a 7?

13 Q. They're talking about the hazard communication standard,
14 and they say there is no provision in OSHA standard that
15 requires the immediate dissemination of information regarding a
16 suspect occupational health hazard. However, if we find that
17 there is a specific health hazard present, that information will
18 have to be shared with the affected and potentially affected
19 employees.

20 They're referring to the hazard communication
21 standard.

22 A. Yes.

23 Q. And they're saying that if they know what the hazards are
24 they have to share it; is that right?

25 A. Yes.

1 Q. Now, under the regulation, they had to find out.

2 A. Yes.

3 Q. But they're taking the position that if they don't find out
4 they don't have to share it.

5 MR. MEADOR: Objection. Calls for speculation,
6 argumentative.

7 THE COURT: Overruled.

8 A. Yes.

9 Q. And that was essentially what Mr. Meador was asking you
10 about earlier; right?

11 A. Yes.

12 Q. And by the way --

13 MR. MCCLAIN: Would you bring up that record, Scott,
14 that has -- when they narrowed it down to three chemicals?

15 Q. And they had it narrowed down to three chemicals, Doctor.
16 One of them was acetaldehyde as Dr. Lockey said in his paper; is
17 that right?

18 A. Yes.

19 Q. Benzaldehyde?

20 A. Yes.

21 Q. And finally diacetyl.

22 A. Yes.

23 Q. And is that why Dr. Lockey said acetaldehyde and other
24 flavoring ingredients were identified?

25 MR. MEADOR: Calls for speculation. Lacks foundation.

1 MR. MCCLAIN: Strike that. I withdraw the question.

2 BY MR. MCCLAIN:

3 Q. Dr. Lockey said in the clip that Mr. Meador showed you
4 other chemicals and predominantly acetaldehyde; right?

5 A. He mentioned acetaldehyde and other chemicals.

6 Q. These are the other chemicals.

7 MR. MEADOR: Calls for speculation, lacks foundation.

8 THE COURT: Overruled.

9 A. Yes.

10 Q. And, Doctor, was it permissible for Givaudan, as they did,
11 not to find out which of these chemicals it was for sure, or
12 under the hazard communications should they have found out the
13 health effects of these three identified chemicals?

14 MR. MEADOR: Object to form. Compound. Calls for
15 speculation.

16 THE COURT: Overruled.

17 A. The latter, yes.

18 Q. The latter meaning what?

19 A. The latter meaning they had an obligation to try to find
20 out what the exposure was --

21 Q. Now, he talked about --

22 A. -- that was causing the disease.

23 Q. He talked about Dr. Brooks, and he read you a portion of
24 this document, Plaintiff's Exhibit 132 in evidence.

25 MR. MCCLAIN: Is this loaded, Scott? Page 4 of this

1 document, Scott, I wanted to go to. Number 1, would you bring
2 up the conclusions and recommendations?

3 Q. There appears to be an unusually high number of employees
4 with either suspected or confirmed bronchiolitis obliterans.
5 Was that Dr. -- was that Dr. Brooks' conclusion?

6 A. That's part of them.

7 Q. And page 5. It is recommended that an occupational health
8 program be initiated by Tastemaker and that medical personnel be
9 identified to help with this organization. That's the part that
10 Mr. Meador read?

11 A. Yes.

12 Q. It's the next paragraph he didn't read. It's highly
13 recommended --

14 MR. MEADOR: Objection. Misstatement.

15 A. He did read that paragraph.

16 Q. He did read that paragraph? My mistake.

17 THE COURT: Just a -- just a second.

18 MR. MCCLAIN: I withdraw the question.

19 THE COURT: Well, that's fine. But we need to let
20 Mr. McClain finish his question before you interpose an
21 objection. You can't speak over him while he's still asking a
22 question. So why don't you rephrase the question.

23 MR. MCCLAIN: I will.

24 BY MR. MCCLAIN:

25 Q. I want to ask you a question then about paragraph 5. Did

1 they ever do the epidemiologic investigation?

2 A. No.

3 Q. Did they ever do the investigation in number 2 to determine
4 which workplace exposures are affecting persons who have
5 abnormal lung function or who note respiratory complaints?

6 A. No.

7 Q. Would that have been possible to do, Doctor?

8 A. Yes.

9 Q. Was that advisable to do?

10 A. Yes.

11 Q. Now, Mr. Meador said, you know, there was nothing published
12 in the literature until 2002. Do you remember those questions?

13 A. Yes.

14 Q. Was Dr. -- was Dr. Brooks suggesting they do exactly what
15 NIOSH did at Jasper Popcorn way back in 1994?

16 A. Yes.

17 Q. And --

18 A. And more.

19 Q. Huh? And more. And Dr. Brooks was suggesting that it be
20 done, and would NIOSH have come in in 1994 to Givaudan's plant
21 and done the very same thing they did in Jasper in 2002 which
22 led the rest of the world to recognizing what they knew back at
23 that time and conducted the discover -- the study that he was
24 suggesting?

25 MR. MEADOR: Objection. Lacks foundation, argument,

1 object to form.

2 THE COURT: Overruled.

3 A. Yes. NIOSH does those kinds of tests and health workplace
4 evaluations for employers all the time.

5 Q. And, Doctor, did the technology and the expertise exist
6 when Dr. Brooks suggested it within NIOSH to conduct the
7 essential -- essentially the same study that they conducted in
8 2002 at the Jasper plant?

9 A. Yes.

10 Q. And was the coroner suggesting to them as early as '92 that
11 they do this kind of inquiry?

12 A. Yes.

13 Q. Now, he said that -- or suggested to you that the reason
14 that they didn't use Dr. Brooks any further was because he began
15 teaching in south Florida. Do you remember those questions?

16 A. Yes.

17 Q. Wasn't the real reason why Dr. Brooks was not retained was
18 because they weren't sure he could handle litigation?

19 MR. MEADOR: Objection. Calls for speculation.

20 THE COURT: Sustained.

21 BY MR. MCCLAIN:

22 Q. Have you examined Dr. Hochstrasser's notes, Exhibit 2014?

23 A. Yes.

24 MR. MCCLAIN: Is this loaded, Scott? You've got it
25 loaded?

1 Q. These are his handwritten notes?

2 A. Yes.

3 Q. Page 6424. Did you read the note, Doctor, where he wrote
4 the question about Dr. Brooks after addressing confidentiality,
5 "Could he handle litigation," question mark?

6 A. Yes.

7 Q. So at the very beginning of all this, their -- one of their
8 concerns apparently was litigation.

9 A. Yes.

10 Q. Not employee health.

11 A. Correct.

12 Q. Now, he then mentioned -- he then mentioned to you the
13 International Bakers study. Do you recall that?

14 A. Yes.

15 Q. And was Givaudan a defendant in the International Bakers
16 study lawsuit?

17 A. Yes.

18 Q. Now, Doctor, there is an instruction that I want to get
19 regarding -- here it is. In this case a defense that Givaudan's
20 raising is called the state of the art defense. Are you
21 familiar with that?

22 A. Yes.

23 Q. And --

24 MR. MCCLAIN: Scott, can I switch over to this, or do
25 you have this loaded?

1 Q. It says, "The state of the art is the safest and most
2 advanced technology and the most current scientific knowledge
3 that reasonably could have been used in the design of butter
4 flavorings at the time that they were manufactured. In
5 determining whether the design of Givaudan's butter flavoring
6 containing diacetyl was state of the art, you should consider
7 whether the butter-flavoring industry, using the technology and
8 scientific knowledge that existed at the time, could feasibly,
9 practically, and economically have designed a butter flavoring
10 that would have prevented Ron Kuiper's injuries while at the
11 same time meeting the needs of the butter-flavoring users
12 generally. Custom in the industry is not necessarily the state
13 of the art, nor is every alternative design for which technology
14 exists necessarily feasible so that a design for which
15 technology exists but that is not feasible is not state of the
16 art."

17 Are you familiar generally with this concept, Doctor?

18 A. Yes.

19 Q. And have you reviewed the filings that were made in that
20 case and were available to the entire butter-flavoring industry
21 regarding what ought to be done about these flavorings?

22 MR. MEADOR: Object to the form of the question.
23 Leading, suggestive, lacks foundation.

24 THE COURT: Sustained as to leading.

25 BY MR. MCCLAIN:

1 Q. Doctor, have you reviewed the file?

2 A. Of the Bakers case?

3 Q. Yes.

4 A. Yes.

5 Q. And, Doctor, does it assist you in rendering an opinion
6 regarding this state of the art in regard to butter flavors?

7 A. Yes.

8 Q. Doctor, do you know who Dr. Susan Daum is?

9 A. Yes.

10 Q. Doctor, was she -- what was her role in that case?

11 A. She was a specialist in occupational medicine and internal
12 medicine, and she was a witness at the request of the workers
13 who were injured.

14 MR. MEADOR: I'm going to object. This is beyond the
15 scope.

16 THE COURT: Overruled.

17 BY MR. MCCLAIN:

18 Q. And, Doctor, have you reviewed her affidavit?

19 A. Yes.

20 MR. MCCLAIN: Your Honor, Exhibit 473 in evidence. Is
21 this loaded, Scott? Would you go to the last page of Dr. Daum's
22 affidavit. And this was 19 --

23 MR. MEADOR: I'm going to object. We have a B
24 objection, hearsay.

25 THE COURT: Overruled.

1 MR. MCCLAIN: This is 19 --

2 THE COURT: Just a second. Did you tell me -- you
3 said this was in evidence.

4 MR. MCCLAIN: This was on the exhibit list with a B
5 objection covered by the previous discussion.

6 THE COURT: Oh, okay. Well, then it's in evidence.

7 MR. MCCLAIN: Yes, it is.

8 THE COURT: Yeah, because I overruled the objection.

9 MR. MCCLAIN: You did.

10 THE COURT: Yeah.

11 BY MR. MCCLAIN:

12 Q. Dr. Daum wrote to the entire industry in 1989, "The fact
13 that defendants supplied chemicals to International Bakers
14 Services as the ultimate users and consumers without having
15 first tested these chemicals for inhalation or taken appropriate
16 measures to see if they were safe for use by humans is
17 tantamount to using the blenders at International Bakers
18 Services as blue-collar guinea pigs." Was that her opinion,
19 Doctor?

20 A. Yes.

21 Q. And, Doctor, did that same practice continue with Givaudan
22 in terms of distributing these products without testing them?

23 A. Yes.

24 Q. And was one of the chemicals identified by Dr. Daum way
25 back in 1989 diacetyl?

1 A. Yes.

2 MR. MCCLAIN: Doctor, that's all the questions I have.

3 THE COURT: Thank you. You may step down.

4 Everybody can take a stretch break.

5 Mr. McClain, are you ready to call your next witness?

6 MR. MCCLAIN: Your Honor, it will be a video -- not a
7 video but a CD now, deposition of Dr. Hochstrasser who the
8 jury's heard about.

9 THE COURT: Okay. And do you know approximately how
10 long that deposition is?

11 MR. MCCLAIN: This -- the first volume is 45 minutes,
12 so it is about where --

13 THE COURT: Okay. That should work well in terms of
14 taking our noon recess. Thank you. You may proceed.

15 (Videotaped deposition excerpts of John Hochstrasser
16 taken January 5, 2006, were played in open court.)

17 THE COURT: Mr. McClain, would now be a good time to
18 take our second recess?

19 MR. MCCLAIN: Yes, Your Honor, it would.

20 THE COURT: Okay. Members of the jury, we'll be in
21 recess until 11:20 -- I'm sorry, until 12:20 which would be 25
22 minutes, maybe 26 minutes. Remember keep an open mind until
23 you've heard all of the evidence in the case. Thank you.

24 (The jury exited the courtroom.)

25 THE COURT: Please be seated.

1 What's your plan next, Mr. McClain? Mr. McClain?

2 Mr. McClain? What's your plan next?

3 MR. MCCLAIN: We're playing the remainder of
4 Hochstrasser.

5 THE COURT: And how long will that be?

6 MR. MCCLAIN: Hour and a half. And then Stuart Brooks
7 is a half hour. Does that take us to 2:30?

8 THE COURT: Okay. Great. Thank you. See you back
9 here at 1:20 -- I'm sorry, 12:20.

10 (Recess at 11:55 a.m.)

11 THE COURT: Ready to have the jury brought in?

12 MR. PAGLIARO: Yes, Your Honor.

13 MR. MCCLAIN: Yes, sir.

14 THE COURT: Thank you.

15 (The jury entered the courtroom.)

16 THE COURT: Thank you. Please be seated.

17 And we're going to continue with the deposition clip;
18 is that correct?

19 MR. MCCLAIN: Yes, of Dr. Hochstrasser.

20 THE COURT: Okay.

21 MR. MCCLAIN: This is the second volume that was
22 resumed on a different day.

23 THE COURT: Okay. Thank you.

24 (Videotaped deposition excerpts of John Hochstrasser
25 taken March 10, 2006, were played in open court.)

1 THE COURT: Could we stop at some point so I can give
2 everybody a stretch break? Okay. Great.

3 Matter of fact, why don't I give everybody -- why
4 don't we just take a ten-minute recess because it's kind of like
5 watching a long full-length feature film. So why don't we take
6 a 10-minute recess, and we'll reconvene at 1:25. Thank you.

7 (The jury exited the courtroom.)

8 THE COURT: Anything we need to take up?

9 MR. MEADOR: No, Your Honor.

10 THE COURT: Okay. Thank you.

11 (Recess at 1:15 p.m.)

12 THE COURT: Ready for the jury?

13 MR. MCCLAIN: We are.

14 THE COURT: Thank you.

15 (The jury entered the courtroom.)

16 THE COURT: Thank you. Please be seated.

17 (Continuation of videotaped deposition.)

18 MR. MCCLAIN: There's another short volume of this.

19 THE COURT: Okay. Why doesn't everybody take a
20 stretch break.

21 MR. MCCLAIN: Judge, just to give you a heads-up,
22 there's 8 minutes on this next one and then 29 on Brooks, so we
23 might be a little bit over at 2:30, about 5 minutes or so.

24 THE COURT: Okay. I think we'll -- can everybody stay
25 an extra five minutes so we can get it done? That'd be great.

1 Thank you.

2 Please be seated.

3 (Videotaped deposition excerpts of John Hochstrasser
4 taken April 30, 2008, were played in open court.)

5 THE COURT: Are we going to shift now to the next
6 deposition?

7 MR. MCCLAIN: Yes, Dr. Brooks, Your Honor.

8 THE COURT: Okay. And I just wanted to -- I'm not
9 going to bother to turn the lights on, but I just did want to
10 explain to the members of the jury that the videotaped
11 depositions have obviously been edited, and that's why it's kind
12 of jerky at times, and it's edited for a couple of reasons.

13 The parties either get together and agree on certain
14 segments that should be in it, or I rule on various objections,
15 and then it gets edited, so that's why it's edited.

16 There's nothing wrong with it being edited. I've
17 rarely ever had a videotaped deposition played in court that
18 wasn't edited for the reasons that I just indicated. So it's
19 really part of the custom and practice of videotaped
20 depositions.

21 You ready to proceed?

22 MR. MCCLAIN: Yes.

23 THE COURT: Thank you.

24 (Videotaped deposition excerpts of Stuart Brooks taken
25 February 21, 2005, were played in open court.)

1 THE COURT: Does that conclude the testimony for the
2 day?

3 MR. MCCLAIN: It does, Your Honor.

4 THE COURT: Members of the jury, that concludes the
5 testimony for today. Thank you for staying ten minutes late.
6 As a reward, we'll start at 8:35 tomorrow, give you 5 minutes,
7 cut the difference with you.

8 Please keep an open mind till you've heard all of the
9 evidence. And we'll see you at 8:35 tomorrow. And just a
10 reminder, next week we'll be going Monday, Tuesday, and
11 Wednesday but not Thursday and Friday. Thank you.

12 (The jury exited the courtroom.)

13 THE COURT: Please be seated.

14 Anything we need to take up for tomorrow?

15 MR. MCCLAIN: I don't think so.

16 THE COURT: Now, do you think we've got the problems
17 with exhibits resolved because I don't know that I've got an
18 updated exhibit list?

19 MR. MCCLAIN: My understanding was my paralegal had
20 met with someone and decided on a way to get all that
21 straightened out.

22 THE COURT: Okay. Well, we'll hope that happened or
23 will happen.

24 MR. MCCLAIN: Okay.

25 THE COURT: Thanks.

1 Mr. Meador, did you have something?

2 MR. MEADOR: I just want to find out what the line-up
3 was tomorrow.

4 THE COURT: Oh, sure. You guys aren't going to
5 voluntarily do that?

6 MR. MEADOR: We have been.

7 THE COURT: Yeah. Okay. Well, you don't need to do
8 it in front of me because I don't care.

9 Let me just tell you this. I'm just trying to be as
10 candid as I can. I have a totally open mind because I think
11 Mr. Pagliaro said there were two sides. There are usually more
12 sides than two to every given version of events.

13 But I'll just tell you this. I think I've tried a lot
14 more cases than all the lawyers in this courtroom combined. And
15 after two days of testimony, I've never seen a better case for
16 substantial punitive damages than I see in this case from the
17 jury. I mean, I don't know what they're going to do. I'm just
18 saying after two days of testimony I've never seen a stronger
19 case for punitive damages.

20 And, you know, maybe it will be a defense verdict.
21 You never know. Could be. Maybe you'll win on your statute of
22 limitations claim. Could be.

23 I'm just telling you I've seen a whole lot of jury
24 trials. I've seen a lot of punitive damage awards, and I've
25 never seen a better case after two days than this one.

1 So obviously you have evaluated the case completely
2 differently, and that's what makes the world go round, and
3 that's why we have a Sixth and Seventh Amendment, and that's why
4 we have an adversary system.

5 But I'm just telling you from my perspective, I've
6 never seen a better jury case for punitive damages than this
7 one.

8 So we'll see you tomorrow morning at 8:35.

9 (The foregoing trial was
10 adjourned at 2:43 p.m.)
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20 CERTIFICATE

21 I certify that the foregoing is a correct transcript
22 from the record of proceedings in the above-entitled matter.
23
24

25 s/ Shelly Semmler
 Shelly Semmler, RMR, CRR

3-24-09
Date

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